Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT of the UNITED STATES

STEPHEN J. WALKER,

Petitioner,

v.

STATE of NEW YORK,
STATE OF NEW YORK OFFICE of TEMPORARY and DISABILITY ASSISTANCE,
STATE OF NEW YOURK DEPARTMENT OF TAXATION and FINANCE,
SANDRA C. WALKER

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Appellant, Stephen J. Walker ("Walker"), appealed, as a matter of right, to the United States Court of Appeals for the Second Circuit ("the Second Circuit") from dismissal by the Eastern District of New York ("EDNY"), the Honorable Denis Hurley, Judge Presiding.

Prior to ***Exxon-Mobil Corp. v. Saudi Basic Indust. Corp.*, 125 S. Ct. 1517 (2005),** the EDNY dismissed Walker's action seeking declaratory judgment and prospective injunctive relief against the State of New York and two of its agencies ("the State"); dismissal was based solely upon the Rooker-Feldman doctrine. ***District of Columbia Court of Appeal v Feldman*, 460 U.S. 462 (1983) *Rooker v Fidelity Trust Co.* 263 U.S. 413 (1923)**

The Second Circuit affirmed, not on the basis of Rooker-Feldman which *was* asserted by the State in the EDNY, but on sovereign immunity under the Eleventh Amendment, which *was not* raised by the State at any time in the district court. So (naturally), Walker did not brief sovereign immunity in his Second Circuit Appellant's Brief. After the State raised sovereign immunity for the first time in their Second Circuit Appellee's Brief, (of course) Walker responded in his Reply Brief with an abbreviated rebuttal (given the page count limitations upon the Reply Brief, and the fact that Walker also had to address the other issues raised by the State in their Appellee's Brief).

In due course, oral argument was allowed before a Second Circuit panel, the Honorable Circuit Judge Reena Raggi, Judge Presiding, the Honorable Circuit Judge Roger G. Miner, and the Honorable District Judge Kenneth M. Karas (S.D.N.Y., sitting by designation). [1]

[1] Walker's pro bono counsel came to his case very late, having agreed to present Walker's oral argument the week prior to the oral argument.

The panel gave the basis of the EDNY dismissal, the Rooker-Feldman doctrine, only passing mention in light *of* ***Exxon-Mobil v. Saudi Basic Indust. Corp.*****, supra,** and directed their questions to the issue of sovereign immunity, raised for the first time in the case by the State in their Second Circuit Appellee's Brief.

As Walker's pro bono counsel, Mr. Stanley Charles Thorne, explained why the Eleventh Amendment does not bar Walker's action, the Presiding Judge asked, **"Are any of these arguments made in the Brief?"** Walker's counsel began to answer, as the Presiding Judge continued: **"You know it is our Court's policy not to hear arguments even that are made in Reply Briefs, let alone for the first time at oral argument."**

Walker's counsel argued the need for additional briefing of the sovereign immunity issue because the page limits on Walker's Reply Brief (15 pages, inclusive of rebuttal on issues other than sovereign immunity) had precluded adequate treatment of the sovereign immunity issue. The panel demurred on the suggestion for more briefing and oral argument concluded shortly thereafter.

The panel judgment issued in due course, affirming dismissal on the basis of the sovereign immunity argument raised for the first time in the case by the State in their Second Circuit Appellee's Brief.

Curiously, Walker's rebuttal of the sovereign immunity bar was ignored by the panel because the Second Circuit policy that allows an Appellee to win an appeal:

When he recognized the page constraints upon Walker's Reply briefing on the subject of sovereign immunity, he filed a written motion for additional time for oral argument; the motion was verbally denied at the commencement of oral argument by the Presiding Judge.

a) on grounds an Appellee did not raise in the district court;

b) raised for the first time in the Circuit in Appellee's Brief;

c) to which Appellant's Reply Brief rebuttal is ignored by the Circuit; and

d) to which Appellant's oral argument rebuttal is ignored by the Circuit.

The Second Circuit's policy is not found in the local rules of the Circuit; consequently, Walker had no notice of it until it was stated by the Presiding Judge on the record in oral argument of this case on September 13, 2005 (as evidenced by the audio tape Walker purchased from the Clerk of the Second Circuit).

In sum, the Second Circuit heard the State's argument on the dispositive issue of law, turned a deaf ear to Walker's rebuttal, and then decided the case on the State's argument, without any consideration of Walker's argument.

Under these circumstances, this Petition presents four questions. These questions relate to both: (1) Walker's Petition for this Honorable Court to exercise its supervisory power; and (2) Walker's Petition for Writ of Certiorari. However, if this Court exercises the supervisory power as Walker suggests in his prayer for relief, infra, then issuing the Writ of Certiorari may not be necessary.

As a Petitioner *pro se*, Walker asks for liberal construction of this Petition, to the end that he is afforded all relief to which he may show himself entitled. All Walker asks is that, when he has his day in court, the court does not turn a deaf ear, as the Second Circuit panel did when they completely ignored his reply brief, his oral argument, his request for additional time in oral argument, and his request for additional briefing on the State's assertion of sovereign immunity under the Eleventh Amendment.

Supervisory Power

1. Is this a case in which "...a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, ... as to call for an exercise of this Court's supervisory power..."? (Supreme Court Rule 10(a)).

The legal effect of the unwritten Second Circuit policy upon Walker's appeal is such that the Second Circuit has denied him due process of law and equal protection of the laws in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Needless to say, when a United States court of appeals denies a citizen due process and equal protection, it has **"... so far departed from the accepted and usual course of judicial proceedings, ... as to call for an exercise of this Court's supervisory power**..." Supreme Court Rule 10(a).

The Second Circuit's unwritten policy completely thwarted Walker's appeal; in so doing, the Second Circuit contradicted both the letter and the spirit of the United States Constitution.

Due Process

2. Did the application of the unwritten Second Circuit policy upon Walker deny him the due process of law to which he is entitled under the Fifth and Fourteenth Amendments of the United States Constitution?

> **"Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an**

enactment would not be violative of the constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department-the source and fountain of justice itself-has yet the authority to render lawful that which, if done under express legislative sanction, would be violative of the constitution. If such power obtains, then the judicial department of the government, sitting to uphold and enforce the constitution, is the only one possessing a power to disregard it. If such authority exists, then, in consequence of their establishment, to compel obedience to law, and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent." *Hovey v. Elliott,* 167 U.S. 409, 416 (1897).

Equal Protection

3. Did the application of the unwritten Second Circuit policy upon Walker deny him the equal protection of the laws to which he is entitled under the Fifth and Fourteenth Amendments of the United States Constitution?

It is manifest from the official audio-tape recording of Walker's oral argument on September 13, 2006 that the Second Circuit heard only one party, the State, on the sole legal issue upon which Walker's appeal was decided, the State's asserted sovereign immunity under the Eleventh Amendment.

When Walker and the State are at the bar of justice, they are equals in law. In other words, if the Second Circuit hears and considers the State's assertion of sovereign immunity, then, as a matter of fundamental fairness, the Second Circuit must hear and consider Walker's rebuttal. To do otherwise is to deny Walker the equal protection of the

laws to which he is entitled as a matter of constitutional law. Whether Walker's rebuttal is legally sufficient to win the disputed point of law is immaterial to the threshold requirement that he must be heard.

> **"A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal."** ***Hovey v. Elliott, Id.*** **at 414.**

Important Question of Federal Law

4. Is this a case in which "...a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court ..."? (Supreme Court Rule 10(c)).

In Walker's case, an important question of federal law has been decided by the Second Circuit. That question has not been, but should be, settled only by this Court; it may be stated as follows.

> **Is the Second Circuit authorized, by application of an unwritten Second Circuit policy, to ignore the reply brief and oral argument of an appellant in certain cases, e.g. Walker's case, when his reply brief and oral argument responded to an issue not raised in the district court, but raised for the first time in the circuit court by the appellee's brief?**

The unwritten Second Circuit policy has such profound implications that only the Supreme Court should decide if the Second Circuit may ignore Walker's reply brief and oral argument.

The Second Circuit's unwritten policy contradicts

well-settled law regarding appellate procedure. The benchmark for appellate procedure is set in the Rules of the Supreme Court of the United States. The Second Circuit's unwritten policy contradicts both the letter and the spirit of Rule 15:6, which states in pertinent part: "**Any petitioner may file a reply brief addressed to new points raised in the brief in opposition**.." Rule 15:6 of the Rules of the Supreme Court of the United States (as adopted March 14, 2005, effective May 2, 2005).

LIST OF PARTIES

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

Stephen J. Walker is a citizen of the United States residing in New York State.

The State of New York is one the fifty United States.

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OPINION BELOW

The unpublished opinion and judgment of the United States Court of Appeals for the Second Circuit was entered on September 21, 2005. The Second Circuit affirmed the November 22, 2004 decision of the District Court for the Eastern District of New York dismissing Walker's case. The Second Circuit's judgment was not amended by the Court's subsequent orders of May 10, 2006 and June 8, 2006. After the mandate issued, it was recalled on March 1, 2006 and stayed and has not been reissued.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

The Second Circuit's final order in this case, which denied Walker's request for an En Banc hearing, was entered on June 8, 2006.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment To The United States Constitution.

The Fourteenth Amendment To The United States Constitution.

Supreme Court Rule 10 (a):
a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, ... as to call for an exercise of this Court's supervisory power...

Supreme Court Rule 10 (c):
a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court.

Supreme Court Rule 15. 6. :
any petitioner may file a reply brief addressed to new points raised in the brief in opposition.

STATEMENT OF THE CASE

1. On September 29, 2003, Walker, filed a Federal Summons and Compliant against the State of New York and two State Agencies, and his ex-spouse. Walker sought a declaratory judgment that a particular statutory scheme that authorizes the issuance, modification and enforcement of *pendente lite* awards of support be declared unconstitutional. Walker further sought prospective injunctive relief from said statutory scheme. Walker did not seek any retroactive relief. Walker did not seek to undo any state court judgment.

In summary, the basis of Walker's constitutional challenge is that *pendente lite* awards of support in New York:

a) are made without any showing of need;
b) are made without any financial findings of fact;
c) are based solely upon "conflicting affidavits" which raise triable issues of material fact in dispute, yet no due process hearing is ever held to discern fact from fiction;
d) are not modified retroactively downward at the time of trial, even in cases where the temporary award is found to have been incorrect and excessive;

e) must be modified retroactively upward at the time of trial in cases where a temporary award is found to have been incorrect and deficient;

f) even in cases where an obligor cannot possibly comply with an inaccurate and excessive temporary order (because there is no income sufficient to comply with the order), obligors are subject to the full force and weight of the State's enforcement powers, including but not limited to: incarceration upon a finding of civil or criminal contempt, and revocation of driver's and professional licenses;

g) are used as leverage by the State to coerce obligors into settlement of cases, not upon merit, but solely upon the threatened and accumulated permanent prejudice that is created under the challenged statutory scheme, and from which is there is no hope of recovery.

2. On March 4, 2004, the State moved to dismiss the action stating, inter alia, that Rooker-Feldman bars the action. The State did not raise an Eleventh Amendment argument at any point in the district court.

3. On March 31, 2004, Walker submitted a Memorandum of Law in Opposition to the State's motion to dismiss. It was submitted by his then pro bono attorney, Mr. Burke Probitsky, who passed away on September 16, 2004, prior to the district court's decision.

4. On November 22, 2004, the district court dismissed the action, concluding that the Rooker-Feldman doctrine barred the action. Said order was entered on November 29, 2004. It is noted that this case was decided by the district court prior to the Supreme Court's decision in

***Exxon Mobil Corp. v Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005).** (Appendix D @ 10A)

5. On December 22, 2004, Walker filed a timely Notice of Appeal to the United States Court of Appeals for the Second Circuit.

6. On March 8, 2005, Walker filed his Appellant's Brief.

7. On May 11, 2005, the State filed their brief in opposition, raising the Eleventh Amendment argument that the State did not raise in the district court.

8. On June 21, 2005, Walker filed his reply brief addressing (within the page limits allowed) the Eleventh Amendment argument raised by the State for the first time on appeal.

9. On September 13, 2005, oral argument was had. The Presiding Judge of the panel stated on the record that it is the "policy" of the court to not consider arguments/points raised by an Appellant for the first time either in a reply brief or at oral argument.[1] Given the page restraints for reply briefs, the time limits in oral argument, and the complexity of the issues, Walker did his best to present his rebuttal to the State's Eleventh Amendment argument (including, inter alia, the relationship between Section 1 and Section 5 of the Fourteenth Amendment, and the specific intent and prohibitions of the Eleventh Amendment). However, Walker's counsel was informed by the Presiding Judge that the policy of the court was not to consider new points/arguments raised in reply briefs, let alone arguments raised in oral argument for the first time.

This unwritten Second Circuit policy is the first matter

[1] For a true quote of the Presiding Judge's statement of the Second Circuit's unwritten policy, see the first page 1 of this Petition under Questions Presented.

upon which this Court should exercise its supervisory authority, as a matter of equity, to make right the wrong done to Walker by the Second Circuit. As will be seen below, it is not the only wrong done to Walker by the Second Circuit.

Oral argument concluded with no decision issued from the bench. Walker promptly went to the Clerk's office and paid for an audiotape of the oral argument. Walker was told by clerk that the audiotape would be available and mailed within 3 to 5 days.

10. On September 21, 2005, the Second Circuit affirmed the district court's dismissal, albeit not on the district court's grounds, i.e., Rooker-Feldman, but on Eleventh Amendment grounds. (Appendix A @ 1A)

11. On October 4, 2005, the audiotape of the proceeding had not been received by Walker. Accordingly, Walker filed his unopposed motion requesting an extension of time, to November 4, 2005, to file his petition for rehearing.

12. On November 1, 2005, the audiotape was received by Walker, postmarked October 29, 2005. On November 2, 2005, a call was placed to the Clerk of the Second Circuit to determine the status of Walker's unopposed motion for an extension of time. Walker was verbally informed the motion was granted. The order arrived November 4, 2005, postmarked November 1, 2005.

13. On November 3, 2005, Walker filed his second unopposed motion for an extension of time, to December 5, 2005, to file his petition for rehearing, because the audiotape of oral argument on September 13, 2005 (supposed to arrive in 3 to 5 days) did not arrive until, November 1st, so there was insufficient time to use it in preparation of his petition.

14. On November 30, 2005, a phone call to Clerk of the Second Circuit was placed to determine the status of Walker's second unopposed motion for extension of time to file his petition for rehearing; Walker was verbally informed that the motion was granted to December 5, 2005.

15. On December 2, 2005, Walker's pro bono counsel called and spoke directly to the Clerk of Court, Ms. Roseann MacKechnie; she confirmed Walker's motion for extension of time to file was granted to December 5, 2005, and gave Walker's counsel permission to file Walker's petition for panel rehearing by e-mail (directed to the personal attention of the Clerk of Court, Ms. Roseann MacKechnie).

16. On December 5, 2005, Walker's Petition for Panel Rehearing was filed by e-mail, as per the instructions given to Walker's counsel by Ms. MacKechnie, Clerk of the Second Circuit on December 2, 2005.

17. On January 3, 2006, a call was placed to the Clerk's office to determine if a decision on Walker's Petition for Panel Rehearing had been rendered; Walker was informed no decision had been made on the Petition and that there was a problem with his second unopposed motion for extension of time to file his petition for rehearing. The clerk explained that, while Walker's form T-1080 and certificates of service and conference of the motion were in the case file, they "cannot find the affidavit" in support of Walker's second unopposed motion (made on November 3, 2005) to enlarge time to file the Petition for Panel Rehearing until December 5, 2005. To correct the clerical error, the clerk requested that Walker send in five more copies of the missing affidavit. Walker immediately complied, and on January 3, 2006, sent to the Second Circuit Clerk's office the five copies of the supporting affidavit which were originally sent in with the motion on November 3, 2004.

18. On January 19, 2006, a call was placed to the Clerk to determine if there was a decision on the Petition for Panel Rehearing. Walker's was informed that it was denied and that an order will be mailed to him.

19. On January 23, 2006, a call was placed to the Clerk requesting that a copy of the order denying Walker's Petition for Panel Rehearing be faxed to him, as same had not yet been received by mail. The Clerk promptly faxed a copy of the order dated January 19, 2006, to Walker.

Upon review, Walker discovered the order does not address his Petition for Panel Rehearing, but instead denies his second unopposed motion for extension of time to file his Petition, stating that his motion was filed on January 4, 2006, and was late.

This error is the second matter upon which this Court should exercise its supervisory authority, as a matter of equity, to make right the wrong done to Walker by the Second Circuit. As will be seen below, there is yet a third wrong done to Walker by the Second Circuit.

20. On January 30, 2006, the mandate was issued on the Second Circuit's order of September 21, 2005, affirming the dismissal by the district court. (Appendix A @ 1A)

21. On February 2, 2006, Walker tried to address the Second Circuit's error about the timeliness of his second unopposed motion for extension of time to file his Petition for Panel Rehearing, when he filed a Motion requesting a Stay of the Court's Order of January 19, 2006, directing the Second Circuit's attention to the fact that Walker's second motion made to enlarge time was granted (as twice verbally confirmed by Court personnel, by a deputy clerk to Walker on November 30, 2005, and by Ms. MacKechnie, the Second Circuit Clerk, to Walker's counsel on December 2, 2005),

and upon affidavits of service attesting to the fact that the affidavit in support of his second motion for enlargement (which the Clerk said were lost or were missing) were in fact filed with Court on November 4, 2005.

22. On February 17, 2006, the Court responded to Walker's February 2, 2005 Motion by ordering that Walker could file his Petition for Panel Rehearing out of time, **which was clearly not the case**, because Walker's Petition for Panel Rehearing was timely filed with the Court on December 5, 2005, by e-mail, as per the instructions given to Walker's counsel by Ms. MacKechnie, Clerk of the Second Circuit on December 2, 2005.

This error is the third matter upon which this Court should exercise its supervisory authority, as a matter of equity, to make right the wrong done to Walker by the Second Circuit. As will be seen below, there is yet a fourth wrong done to Walker by the Second Circuit.

23. On March 1, 2006, the mandate was recalled and stayed.

24. On May 10, 2006, the Court denied Walker's Petition for Panel Rehearing without comment on the sole issue he raised, the constitutionality of the unwritten Second Circuit policy to deny an Appellant the opportunity to rebut, in a reply brief and at oral argument, an Appellee's newly raised points/arguments in a brief in opposition. (Appendix B @ 7A)

This error is the fourth matter upon which this Court should exercise its supervisory authority, as a matter of equity, to make right the wrong done to Walker by the Second Circuit. As will be seen below, there is yet a fifth wrong done to Walker by the Second Circuit.

25. On May 30, 2006, Walker filed his motion for En

Banc rehearing to determine address the constitutional issue the panel chose to ignore when they denied Walker's Petition for Panel Rehearing, i.e. the constitutionality of the unwritten Second Circuit policy to deny Walker the opportunity to rebut, in his reply brief and oral argument, the State's newly raised points/arguments in a brief in opposition.

26. On June 8, 2006, the Court[2] denied Walker's Petition for En Banc Rehearing; it is from this order of June 8, 2006 that Walker files this Petition for an Exercise of This Court's Supervisory Authority. (Appendix C @ 9A)

This error is the fifth matter upon which this Court should exercise its supervisory authority, as a matter of equity, to make right the wrong done to Walker by the Second Circuit.

27. On August 30, 2006, the Clerk of the EDNY informed Walker the mandate has not been reissued and same remains Stayed.

REASONS FOR THIS COURT TO EXCERCISE ITS SUPERVISOR POWER AND/OR FOR ALLOWANCE OF THE WRIT

Walker comes before this Honorable Court as a shadow of a man who probably never see the injustice that has befallen him at the hands of the State of New York

[2] On information and belief, the decision was made by the panel. Given the delays, confusion and clerical problems associated with the handling of this case at the Second Circuit it was difficult to determine when the clock began running for the filing of the Writ. Walker respectfully submits that the Circuit's confusion should not act as a prejudicial bar to acceptance of this Writ.

undone. Walker is fifty-seven years of age. He is educated, yet he cannot use his education to earn a living because, inter alia, his credit, has been decimated by the State of New York. Walker is not considered to be of quality employment material because of what the State has done to him. His good name and reputation have been dragged through the dirt by the State because the State's *pendente lite* statutory scheme totally ignores even the most minimal requirements for due process. He has been permanently stigmatized by the State, without a scintilla of proof to support such outrageous conduct by the State.

"Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, the minimal requirements of the [Due Process] clause must be satisfied." ***Goss v Lopez,*** **419 U.S. 565 (1975).**

The Court's mandate in ***Lopez*** is completely ignored by the State's *pendente lite* statutory scheme. Walker is permanently stigmatized by the egregious conduct of the State.

It is salt in Walker's wounds to seek redress in the federal courts, and be treated as the Second Circuit has done in his case.

If this Court allows the Second Circuit's unwritten 'policy' to stand, then the serious underlying issues relating to the State's egregious unconstitutional, and ultimately self-destructive, conduct may never be addressed. That reality is an insult to Walker, the citizens of New York, and to the citizens and taxpayers of this nation, whose tax dollars are disbursed by the federal government to the State of New York for support enforcement purposes.

The State's conduct perpetrated against Walker is replicated in thousands of other cases as a practice and

pattern; from that pattern of conduct, the State of New York supplies the federal government with inflated, hence false and fraudulent, arrearage balances of allegedly uncollected support, and in return, the federal government pays millions in incentive money back to the State as support enforcement subsidies.

In Walker's case, and thousands of others just like his, the alleged arrearage balances are derived from *pendente lite* awards that have never been subjected to a due process hearing to discern fact from fiction. The State's submission of false, unjustified and bogus information, intentional or not, constitutes a fraud upon the nation.

The State's unconstitutional statutory scheme skews the statistics upon which the government relies for expenditures from the public fisc. Moreover, the State inflates the number of purported "dead beats" in America. The State is creating fictitious "dead beats" for the federal incentive money that is corrupting the State judicial process on an unprecedented and unimaginable scale.

As a direct result of the Draconian effects of the State's flagrantly unconstitutional *pendente lite* statutory scheme, Walker is one of the forty-two plus million Americans who cannot afford health insurance. He cannot leave the country because he cannot secure a passport. He may not drive out of New York, and may only drive within the state with specific restrictions placed upon him. He may not obtain a professional or occupational license. Quality employers considered him to be a poor candidate for employment. He is shackled by the State, constantly under the threat of incarceration. He has been for all intents and purposes reduced to a pauper.

The dismal plight of Walker is due to that fact that he was subjected to the State's unconstitutional *pendente lite* statutory scheme, was unable to comply with an inaccurate

and excessive temporary support order granted without a hearing and having no basis in fact, and that, **by State design,** the permanent prejudice created by and accumulating from said statutory scheme can never be adjusted downward. However, it continues to adjust upward at 9% per annum.

The plain cold fact of the matter is temporary orders in New York become permanent orders, despite the fact that they have no basis whatsoever in "fact", and once the debt snowball begins to roll, it grows out of control so that Walker, and thousands like him, can never catch up.

This Court has stated historically in numerous cases, that the **"fundamental requisite of due process of law is the opportunity to be heard... at a meaningful time.."** See, e.g. ***Goldberg v. Kelly,* 397, U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), and *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).**

Walker went to federal court because he thought this Court's mandate, that the **"fundamental requisite of due process.. to be heard... at a meaningful time..."** must surely apply to federal court trials and federal appeals as a matter of right. If not, then our system of justice, indeed the very foundation upon which the pillars of this great nation rest, is in grave peril. Due process of law is the cornerstone of our representative republic and our way of life. Due process guarantees a level playing field in order that disputed issues of fact may be adjudicated without inherent bias or favoritism.

The Second Circuit's unwritten policy creates an un-level playing field and is an affront, indeed a direct assault, on due process of law and the guiding principals of fundamental fairness and substantial justice that are inherent within due process. It reeks with bias and favoritism.

Walker submits, respectfully, that if the Supreme Court does not use its supervisory power to require the Second Circuit to abandon its unwritten policy, then, indeed, due process of law is dead in America.

1. **REVIEW IS NECESSARY AND WARRANTED TO RESOLVE THE DISCREPENCY BETWEEN ACCEPTED JUDICIAL STANDARDS, THE RULES OF THE SUPREME COURT, AND THE UNWRITTEN POLICY OF THE SECOND CIRCUIT COURT OF APPEALS.**

2. **REVIEW IS NECESSARY TO PRESERVE NOT JUST DUE PROCESS OF LAW, BUT ALSO THE RULE OF LAW, WITHOUT WHICH THE INTEGRITY OF, AND FAITH IN, THE AMERICAN JUDICIAL SYSTEM, MISERABLY FAILS.**

3. **REVIEW IS NECESSARY IN ORDER THAT WALKER MAY HAVE A REASONABLE OPPORTUNITY TO DEVELOP AND PRESENT ARGUMENTS IN HIS APPEAL OF RIGHT, SO THAT, IF NECESSARY, HE MAY PETITION THIS COURT FOR DISCRETIONARY REVIEW OF A PROPER RECORD.**

The Second Circuit's unwritten policy is an insurmountable obstacle to Walker's appellate recourse to this Court because it prevents him from making a record upon which to appeal. Walker is compelled to give examples inasmuch as this Court is Walker's last hope of judicial consideration. To wit:

Equitable Principles of Estoppel and Waiver:

Walker was denied the opportunity to argue any of the many good reasons which militate against allowing the State to raise a jurisdictional bar on appeal that they failed to assert in the district court.

Allowing the State to raise the Eleventh Amendment for the first time on appeal frustrates judicial economy for both the district court and the Circuit. Moreover, it unfairly subjects Walker to additional time and dollar costs of litigation which might have been truncated if the State had timely raised the issue in the district court.

If the State were required to raise the Eleventh Amendment at the outset of the litigation in district court, it would serve the interests of justice and promote judicial economy. The State had the opportunity to raise the Eleventh Amendment in the district court, but chose not to.

It is perplexing to Walker that the Second Circuit permitted the State to raise the Eleventh Amendment for the first time, not as an Appellant in the context of the State's own appeal from the decision of the district court, but as an Appellee in the context of Walker's appeal. At least one member of the Second Circuit panel was also perplexed.

During oral argument, Judge Miner asked the State's counsel why the State did not raise the Eleventh Amendment in the district court. The State's counsel, Assistant Attorney General Walsh, had no substantive response, other than to indicate he really didn't know. Judge Miner commented, **"That's unusual isn't it."** Assistant Attorney General Walsh replied, **"I don't know why it wasn't raised below."**

Walker deserves the opportunity to make his case for the position that sovereign immunity under the Eleventh

Amendment is not an absolute bar nor one that the State is free to raise at any time without regard to the legal effects upon the courts and the other party. If citizens may waive their constitutional rights, then fundamental fairness certainly means the State may waive the protection of the Eleventh Amendment, or be estopped to assert it.

The Eleventh Amendment Is Not A Proper Bar To This Action:

Walker respectfully submits that application of the Eleventh Amendment, has been stretched out of proportion and reason, like Rooker-Feldman. ***Exxon-Mobil Corp. v. Saudi Basic Indust. Corp.*, 125 S. Ct. 1517 (2005).**

Walker disputes the State's assertion that his action is barred by sovereign immunity under the Eleventh Amendment, but he has not had a fair opportunity to articulate why.

In the American system of governance, it is the citizen who is sovereign and his authority is delegated along the lines of his dual citizenship, via the Federal and State Constitutions, to the United States and the State of his residence, respectively.

In respect of Walker, who is a citizen of the United States and the State of New York, neither the United States nor the State of New York are so above the law as to be immune from his legal action to hold them accountable for violation of his Constitutional rights.

When the states joined the union, they relinquished Continental concepts like the "divine right of kings" and "sovereign immunity" in favor of a superior new government construct, of the people, by the people, and for the people.

The history of Walker's case is conclusive evidence

that the State of New York thinks they may, **with impunity**, turn their courts against a law abiding citizen like Walker, and then mercilessly savage him for years, and then deny him redress in the New York appellate courts, and then, when he turns to the federal forum (as he most certainly is entitled to do as a citizen of the United States), seek to deny him that forum on the obviously specious basis of the Rooker-Feldman doctrine, and then, when the Supreme Court rightly shrinks the scope of that doctrine back to its original size in ***Exxon,*** **supra**, trot out the Eleventh Amendment like it is some sort of "King's X", which it is not. That is precisely the kind of State overreaching the Founding Fathers intended to prevent by placing the Constitution between the State and a citizen like Walker.

With all due respect to the Second Circuit panel, the Eleventh Amendment is not an absolute bar to jurisdiction. Allowing the State to raise the Eleventh Amendment for the first time in Walker's appeal precludes Walker's opportunity to adequately develop his rebuttal of the State's Eleventh Amendment argument, *inter alia*:

> a detailed analysis of the interaction between Sections 1 and 5 of the Fourteenth Amendment;
> whether the Fourteenth Amendment is self-executing in light of its legislative history vis-à-vis the Eleventh Amendment;
> whether the legislative history of the Eleventh Amendment was considered by the Second Circuit when they reversed ***Santiago v. New York State Department of Correctional Services,*** **725 F. Supp. 780, (SD NY 1989)** ; and how the implications of the aforestated apply to Walker's action.

Had the State timely raised the Eleventh Amendment in the district court, Walker's briefing [without page limits] and argument to the district court would have fully developed all of these issues for a proper ruling by the

district court, which Walker could then appeal to the Second Circuit with a record worthy of the preeminent legal issues involved.

It is a disservice to the district court, the Circuit court, and a manifest injustice to Walker, for an issue so important as a jurisdictional bar to be decided on Walker's cursory response within the confines of the 15 page limits of his Reply Brief and moreover, for that cursory response to be ignored based upon the policy of the Second Circuit.

What Walker attempted to say in his Reply Brief and at oral argument was based upon previous decisions of the Supreme Court and, moreover, upon decisions of the Second Circuit which Walker believes were wrongly decided in light of the very points Walker has not been allowed to brief or argue in either the district court or the Second Circuit. See ***Santiago v. New York State Department of Correctional Services,*** **supra,** ***Santiago v. New York State Department of Correctional Services,*** **945 F. 2d 25 (C.A. 2 NY 1991)** and ***Seminole Tribe of Florida v. Florida,*** **517 U.S. 44, 63, 116 S. Ct. 1114, 1127, 134 L. Ed. 2d 252 (1996).**

In fact, the Second Circuit's Santiago decision is obviously distinguishable from Walker's case on the facts because while Santiago sought retroactive relief, Walker seeks only prospective relief. But, like the New York state courts, the Second Circuit cannot be bothered with facts.

What The Challenge Involves and What Is At Stake:

When the district court dismissed Walker's case, it turned a deaf ear to seven other citizens of New York State who each submitted an affidavit in the district court attesting to the fact that Walker's plight was not an isolated incident, and that each affiant also was subjected to the challenged statutory scheme, and then permanently, unjustifiably prejudiced by it, because it does not contain one shred of

procedural due process. (Appendix G @ 46 A)

When the Second Circuit improperly affirmed the district court's improper dismissal, the Second Circuit likewise turned a deaf ear to the seven citizens who supported Walker's effort to find federal redress of grievances. (Appendix G @ 46 A)

When the district court dismissed Walker's case, it turned a deaf ear to the deathbed affirmation of Walker's original pro bono counsel, Mr. Burke Probitsky, who brought Walker's action into federal district court. Mr. Probitsky had more than 35 years of dedicated matrimonial practice in New York state courts. He passed away prior to the district court's decision to dismiss. Mr. Probitsky, anticipating his death prior to the conclusion of this case, wrote and signed a deathbed affirmation which is part of the record in this case. When you read between the lines of Mr. Probitsky's affirmation, you hear from beyond the grave from a man who spent his entire professional life laboring in the New York state matrimonial courts and who, when his end was near, was profoundly saddened by what has become of those once honorable New ~~York state~~ matrimonial courts because of the statutory scheme Walker challenges in the case at bar.

On his death-bed, Mr. Probitsky attested under oath to the fact that the challenged statutory scheme wholly lacks due process, and that the unjustified permanent prejudice derived therefrom is used as state leverage to coerce the settlement of cases not upon merit, but with the intimidating state power to levy contempt of court charges, enforced by personal incarceration and financial ruination. Mr. Probitsky further states that the state tribunal is not an impartial tribunal regarding the challenged state statutory scheme. The state tribunal has a vested interest in maintaining that scheme. Mr. Probitsky gave to the Court what he termed "*prima facie* evidence of contamination" which rendered the state court an openly biased tribunal. (Appendix F @ 36A)

Such coercion and permanent prejudice, created by the State's statutory scheme, wreaks havoc on the citizens of New York and destroys lives in the name of the law. Many citizens walk away, [that is those that can still walk], bitter, resentful, and in total disgust with the systemic injustice they have experienced from their judicial system.

When the district court dismissed Walker's case, it turned a deaf ear to the affirmations of two practicing New York attorneys submitted to the district court. Like the death-bed affirmation of Mr. Probitsky, these two attorneys had the courage to stand up and also say that the challenged statutory scheme is devoid of due process, and that the unjustified permanent prejudice derived therefrom is used as state leverage to coerce the settlement of cases not upon merit, but with the intimidating state power to levy contempt of court charges, enforced by personal incarceration and financial ruination.

When the Second Circuit improperly affirmed the district court's improper dismissal, the Second Circuit likewise turned a deaf ear to the corroborating affidavits of those three fine New York lawyers who want their state courts to do substantial justice for the citizens of New York, not systemic injustice.

Under the State's scheme Walker challenges as unconstitutional, many New York citizens are destroyed financially, reduced to poverty, stripped of dignity, and unable to earn a decent living. Perhaps you are asking yourself: "How could this possibly be true?" A complete answer to that question is what Walker's trial on the merits will address in district court. Please consider one example, one small aspect of the unconstitutional and egregious scheme utilized by the State of New York, **which the State does not want any federal judge to closely examine.**

New York's rule of law is that upward modification of an incorrect temporary support award is mandatory, while downward modification of an incorrect temporary support award is prohibited. To be precise, the rule (created by a New York State appellate court in 1983) states that if, in a temporary (i.e. so-called *pendente lite*) support order, the amount of court ordered support is later proven upon evidence to have been too low, then upward retroactive modification of the original support award is mandatory.

Logic, reason, fairness, and equal protection would lead one to expect that the same would be true for a *pendente lite* support order later proven to be too high, i.e., that retroactive downward modification of the original award would likewise be mandatory. Not so, under ***Rodgers v. Rodgers,* 98 A.D. 2d 386, 470 N.Y. s. 2d 401 (2nd Dept.1983),** the State- appellate court declared that the statutory provisions for retroactivity are triggered only when the permanent award is higher than the temporary award. While upward modification is mandatory, there is no reciprocal mandatory downward modification allowed. The abuses this policy creates could fill a book.

Many *pendente lite* support orders are overstated from the beginning because they are granted *ex parte* and they are based on erroneous, fraudulent, perjured, or incomplete evidence. Thus, they create arrearages that most obligors cannot ever catch up with, much less overcome. The immediate result is a growing debt (like a rolling snowball) with unavoidable collection measures, usually without a pre-deprivation hearing, including garnishment of wages and funds on account, seizure of income tax refunds, report of arrearages as bad debts to credit reporting agencies ruining credit, revocation of all manner of licenses (e.g. driver's, professional, and vocational), interference with all manner of permits and privileges (e.g. hunting licenses, fishing licenses, and U.S. passports).

The scope of the State's enforcement powers against the citizen is truly breathtaking, yet it is largely unknown to any except those it victimizes.

Quality employers are reluctant to hire citizens with money judgments, wage garnishment history, and poor credit. Many employers will not hire a potential employee that has a restricted driver's license, a common result of the challenged statutory scheme. Citizens may not drive to another state nor utilize the normal range of driving privileges. Citizens with monetary judgments resulting from excessive temporary awards cannot get professional or occupational licenses, or lose them. Hence, employment opportunities are severely curtailed or literally closed to citizens who have been subjected to the State's statutory scheme. These citizens have little credibility in the economic world.

Personal credit, a liberty interest and necessary component to properly function in this day and age, is annihilated by the State's statutory scheme. Without credit in today's world, little can be done economically to better oneself. In fact, without a credit card a citizen cannot perform such simple basics as reserve a motel room in advance, or rent an automobile.

Adding up the totality of consequences that the challenged statutory scheme produces, the bottom line reveals that citizens in New York are suffering immense financial hardship, emotional chaos, and personal devastation because the State's statutory scheme has turned the New York courts against its citizens. For many, including Walker, the result is personal or business bankruptcy, or both. Accordingly, the economy of the State as well as that of the nation suffers.

Far worse than all of this, is that the State's

challenged statutory scheme causes children to suffer. Allowing an unjustified excessive award to stand against one parent, as though it was a legitimate award that had been granted after financial facts have been determined with due process, and empowering the other parent with the knowledge that the temporary award is, in fact, a final award and that said award will be collected at all costs (despite the fact that the award cannot be substantiated by any facts whatsoever) creates an emotional pressure-cooker that wrongfully impacts children.

Children come to believe that their "other parent", the one who goes to jail as a result, does not love them or care about them. Children see one parent, i.e., the payor parent, as a bad parent who does not comply with the "court's order" and needs to go to jail. They are told that, that parent is a "dead beat." All of this converges upon the obligor parent in a way that can and does destroy the parent-child relationship.

However, while certainly compelling, the aforementioned facts and issues relating directly to Walker's action, and the horrific and unconstitutional conditions that presently exist in New York State, are not relative to the merit of this request that the Supreme Court exercise its supervisory power. Walker asks this Court's forgiveness for reiterating same. However, Walker full-well realizes that this Honorable Supreme Court is Walker's last recourse in his attempt to find "justice" in the judicial process. To date no court seems interested in reviewing and/or addressing what is so blatantly unconstitutional.

So we return to the questions presented of which the first may be all this Honorable Supreme Court need consider.

1. Is this a case in which "...a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, ... as to call for an exercise of this Court's supervisory power..."?

The only issue before this Court is whether, or not, the unwritten, stated and practiced policy of the United States Court of Appeals for the Second Circuit, that denies due process and equal protection of law to Appellants, as here, who seek only to prosecute their appeal as a matter of right, is a constitutional policy. Review of Walker's case is essential. What originally began as a denial of due process and equal protection of law on the most basic level of citizen-state interaction and has never been addressed on the merits has now morphed into a denial of due process and equal protection by the United States Court of Appeals for the Second Circuit.

CONCLUSION

Surely this is a case in which "...a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings, ... as to call for an exercise of this Court's supervisory power..."? (Supreme Court Rule 10(a)).

Walker respectfully requests, indeed he prays, that the Supreme Court of the United States utilize its supervisory power over inferior courts to vacate the Second Circuit's opinion and judgment of September 21, 2005 and all orders subsequent thereto, and remand Walker's case to the Second Circuit for full briefing and oral argument on the issue of sovereign immunity asserted by the State of New York under the Eleventh Amendment of the United States Constitution.

Respectfully Submitted,

Stephen J. Walker
Petitioner, *Pro Se*
5 Upham Down, Box 951
Shoreham NY 11786
631-821-8604

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT,BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of September, two thousand five.

PRESENT: HONORABLE ROGER J. MINER,
HONORABLE REENA RAGGI, Circuit Judges,
HONORABLE KENNETH M. KARAS, District Judge.[1]

STEPHEN J. WALKER,
Plaintiff-Appellant,

v. No. 05-0229

STATE OF NEW YORK, STATE OF NEW YORK OFFICE OF TEMPORARY AND DISABILITY

---

[1] The Honorable Kenneth M. Karas of the United States District Count for the Southern District of New York sitting by designation.

ASSISTANCE, STATE OF NEW YORK
DEPARTMENT OF TAXATION
AND FINANCE and SANDRA C. WALKER,
Defendants-Appellees.

APPEARING FOR
APPELLANT:

STANLEY CHARLES
THORNE,
Houston Texas (Michael
Varble, Mohegan Lake,
New York, on The brief)

ISSUED AS MANDATE:
1/30/06

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT,BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of September, two thousand five.

PRESENT: HONORABLE ROGER J. MINER,
HONORABLE REENA RAGGI, Circuit Judges,
HONORABLE KENNETH M. KARAS, District Judge. [1]

STEPHEN J. WALKER,
Plaintiff-Appellant,

v. No. 05-0229

STATE OF NEW YORK, STATE OF NEW YORK
OFFICE OF TEMPORARY AND DISABILITY

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[1] The Honorable Kenneth M. Karas of the United States District Count for the Southern District of New York sitting by designation.

ASSISTANCE, STATE OF NEW YORK
DEPARTMENT OF TAXATION
AND FINANCE and SANDRA C. WALKER,
Defendants-Appellees.

APPEARING FOR
APPELLANT:

STANLEY CHARLES
THORNE,
Houston Texas (Michael
Varble, Mohegan Lake, New
York, on the brief)

APPEARING FOR APPELLEES:

PATRICKJ. WALSH, Assistant Solicitor General (Michelle Aronowitz, Deputy Solicitor General, on the brie/), for Eliot Spitzer, Attorney General of the State of New York, New York, New York.

Appeal from the United States District Court for the Eastern District of New York (Denis R. Hurley, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court, dated Novernber22, 2004, and entered on November 29,2004, is hereby AFFIRMED.

Plaintiff Stephen J. Walker, who in the course of divorce litigation had been ordered by a New York State Supreme Court to make pendente lite payments for the maintenance of his wife and support of his children, filed this federal action to challenge the constitutionality of the state statutory scheme authorizing such payments. He now appeals the district court's dismissal of his lawsuit pursuant to District of CoJumbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fidelity Trust Co" 263 U.S.

413 (1923) (the "Rooker. Feldman doctrine"). See Walker v. State of New York, 345 F, Supp, 2d 283 (E.D,N.Y. 2004). We assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision.

We review a judgment of dismissal de novo. See Celestine v. Mount Vernon Neighborhood Health Ctr., 403 F3d 76, 79-80 (2d Cir. 2005). In considering the district court's Rooker-Feldrnan dismissal, we are mindful that the Supreme Court has recently clarified the scope of that doctrine. specifically cautioning courts not to confuse it with "preclusion," which may provide a separate ground for dismissal of parallel litigation, but which His not a jurisdictional matter," Exxon Mobil Com. v Saudi Basic Indus. Com.,125 S. Ct. 1517, 1527 (2005); See Hoblock v. Albany County Bd. of Elections. Nos. 045876,04-5993,2005 U.S. App. LEXIS 19071 (2d Cir. Sept. 2, 2005). Because Walker asserts that his federal suit presents an independent claim from those raised in his state court challenges to the pendente lite orders, See Walker, 345 F.Supp 2d at 292 - an argument challenged by defendants - we would normally have to determine whether a jurisdictional dismissal pursuant to Rooker.FeJdrnan was appropriate, Of whether further consideration of state preclusion law is necessary in this case. See Hoblock v. Albany County Bd. of Elections, 2005 U.S. App. LEXIS 19071 at *38 ("Exxon Mobil teaches that the narrow Rooker-Feldman inquiry is distinct from the question whether claim preclusion (res judicata) Of issue preclusion (collateral estoppel) will defeat a federal plaintiffs suit.").

We need not do so in this case, however, because defendants correctly point to another ground for jurisdictional dismissal, the Eleventh Amendment, see U.S. Const. amend. XI, which "render[s] states and their agencies immune from suits brought by private parties in federal court," unless Congress unequivocally expresses its intent to

abrogate that immunity or a state waives its immunity. In re Charter Oak Assocs., 361 F3d 760, 765 (2d Cir. 2004). This jurisdictional bar applies "whether the relief sought is legal or equitable." Papasan v. Allain, 478 U.S. 265, 276 (1986). In this federal action, Walker sues the State of New York and two of its agencies. (He also names his ex-wife as a defendant, but it appears that she is named simply as a party with an interest in pendente lite payments from Walker; the complaint states no claim against her). He does not name any state official as a defendant so as to present a possible exception to 11th Amendment immunity pursuant to Ex parte Young, 209 U.S. 123 (1908); see Santiago v. New York State Dep't of Corr. Servs., 945 F.2d 25,32 (2d Cir. 1991). Walker does not - and could not - contend that Congress has abrogated or that New York has waived its sovereign immunity with respect to the challenge he raises in his complaint. Accordingly, the 11th Amendment bars his- suit.

The district court's November 29, 2004 judgment of dismissal is hereby AFFIRMED.

FOR THE COURT:
ROSEANN B. MACKECHINE 9-21-05
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURTHOUSE
49 FOLEY SQUARE
NEWYORK, 10001

Roseann B. MacKechnie
Clerk

Date: 5/9/06

Docket Number: O5-0229-cv

Short Title: Walker v State of New York

DC Docket Number: 03-cv-4490

DC: EDNY (CENTRAL ISLIP)

DC Judge: Honorable Denis Hurley

Honorable James Orenstein

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 10th day of May two thousand six.

Present: :
Hon. Roger J. Miner, Hon. Reena Raggi,
Circuit Judges,

Hon. Kenneth M. Karas' District Judge/SDNY.

Walker v. State of New York O5-0229-cv

A petition for panel rehearing having been filed herein by appellant Stephen J, Walker,

Upon do consideration thereof, it is

Ordered that said petition be and it hereby is ,DENIED:

For the Court,
Roseann B. MacKechnie.
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT
MOTION INFORMATION STATEMENT

Docket # 05-0229-cv Walker v New York

et, al

Motion for: Leave to file petition for en bane rehearing

Relief Sought: Extension of time to file or in the alternative to leave to file Appellant's Petition for En Banc Rehearing.

Moving Party: Walker Opposing Party: NY State

Stanley Charles Thorne, Esq. Patrick Walsh, Esq.

Court judgment appealed from: 2nd Cir panel judgment

5-10-06

Dated: 5-30-06 ORDER

Before: Hon. R. Miner, R. Raggi, Cir Judges, Hon K. Karas, DCJ IT IS HEREBY ORDERED that the motion for leave to file late petition for rehearing en banc is DENIED.

Dated: June 8, 2006 Roseann B. Mackechnie,

Clerk

APPENDIX D

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

----------X

STEPHEN J. WALKER,

Plaintiff,

-against-

MEMORANDUM OPINION AND ORDER

03-CV-4490 (DRH) (ETS)

STATE OF NEW YORK, NEW YORK STATE OFFICE OF TEMPORARY and DISABILITY ASSISTANCE, NEW YORK STATE DEPARTMENT OF TAXATION and FINANCE, SANDRA C. WALKER,

Defendants.

----------X

APPEARANCES:

Michael Varble, Esq. Attorney for Plaintiff
P.O. Box 485 Shoreham, NY 11786

Eliot Spitzer, Attorney General for the State of New York
Attorney for Defendants
By: Susan M. Connolly, Assistant Attorney General
300 Motor Parkway, Suite 205
Hauppauge, NY 11788

HURLEY, District Judge:

INTRODUCTION

Plaintiff Stephen J. Walker challenges the constitutionality of a New York law allowing the issuance of pendente lite awards of child support and spousal maintenance in divorce proceedings. (ATT NOTES: CHALLENGE IS AGAINST SCHEME OF LAWS, Burke Probitsky)

The defendants (collectively, "the State") have moved to dismiss the complaint. As explained more fully herein, because the "Rooker-Feldman Doctrine"' bars jurisdiction over Plaintiff's claims, the Defendants' request is GRANTED.

BACKGROUND

1. New York's "Pendent Lite" Spousal Maintenance and Child Support Scheme:

Under Section 236(b)(6) of the New York Domestic Relations Law, during a pending matrimonial action the court may order temporary maintenance, based on a variety of considerations, "as justice requires." [1]Such an order is "effective as of the date of the application therefor," and the court may order payment of any retroactive amount of maintenance due. Similarly, under Section 236(b)(7) of the DRL, during a pending matrimonial action the court may order either parent to pay temporary child support "without requiring a showing of immediate or emergency need," and "notwithstanding that information with respect to income and assets of either or both parents may be unavailable." This order is likewise effective "as of the date of its application therefor," and any retroactive amount of child support due is "enforceable in any manner provided by law."

[1] Unless a prenuptial agreement states otherwise. See NY D.R.L. § 236(b)(6)

Under Section 244 of the DRL. where a divorcing or divorced spouse defaults on a required payment (including temporary child or spousal support), the court may' enter judgment for the amount of arrears, with costs and disbursements, plus interest on the amount of any arrears if the default was willful. This judgment is enforceable in any manner provided by law for the collection of money judgments. Where a defaulting spouse accumulates support arrears equal to or greater than four months' total support obligations, Section 244-b authorizes the court to order the department of motor vehicles to suspend the spouse's driving privileges; Section 244-c authorizes the court to order any board, department, authority or office under whom the spouse is professionally affiliated to suspend any "license, permit, registration, or authority to practice"; and Section 244-d authorizes the Court to "order an agency responsible for the issuance of a recreational license to suspend or refuse to reissue a license" to the spouse, or to deny his application for such a license.

According to the complaint, this scheme for ordering and enforcing payment of pendente lite (temporary) support "fails to require a constitutionally mandated due process hearing before granting relief." Complaint at ¶ 1. As a result, "[t] he amounts awarded are purely arbitrary and not based upon any findings of fact whatsoever, and, in the case of excessive or grossly excessive awards, there is absolutely no recourse whatsoever to an aggrieved party," Id. The statutes therefore, both facially and as applied, violate the constitutional due process right of "non -custodial parents and/or payor spouses."

The complaint also alleges that the above statutes "intentionally invidiously discriminate, without a compelling state interest, against a defined and identifiable 'class' of people, to wit: 'familial obligors' who are non-custodial parents and/or spouses." Complaint at ¶ 2. Further, according to the complaint, this scheme affects "most if not

all" New York citizens involved in divorce or support proceedings, and results in 'temporary' awards (that] are, in fact, 'permanent' " Complaint at ¶ 4. This is because the excessive temporary awards inevitably lead to inflated arrears, and the harsh statutory enforcement scheme, in turn, then traps and stigmatizes the payor parent or spouse under a "growing mountain of unconstitutional prejudice." Id. Finally, according to the complaint, the excessive temporary awards also incentivize dilatory conduct by, and amount to "unjust enrichment" of, the obligee spouse or parent, and can "become an obligee parent's nefarious vehicle for parental alienation and the breakdown of the non-custodial parent-child relationship." Id.

II. Facts and Proceedings

The factual background of this case is less than fully clear from the record. [ATT NOTES: FACTS ARE VERY CLEAR, BP]

At some point in the late 1980's, divorce proceedings were initiated between Stephen and Sandra Walker. Complaint at ¶ 5. In 1991, with the proceedings apparently still pending, the New York Supreme Court granted Sandra Walker's requested award of $150 per week in pendent elite spousal maintenance, and $150 per week in child support for each of the couple's three children. Walker v. Walker, 193 A.D.2d 730 (N.Y. App. Div. 1993). Plaintiff appealed these awards as excessive. The Appellate Division affirmed, refusing to substitute its discretion for the trial court's on the conflicting affidavits in the record. Id. The court found that the Supreme Court had "considered all of 'the relevant factors, and the award, given the parties' standard of living is not excessive." Id. [ATT NOTES: IMPOSSIBLE TO DO W/OUT A HEARING TO DETERMINE FACT FROM FICTION, BP] The court noted that "[t]emporary) maintenance and child support are designed to insure that a needy spouse is provided with funds for his or her support

and reasonable needs pending trial, and a speedy trial is the best remedy for perceived inequities in such awards." Id. Plaintiff sought a "downward modification" of the pendente lite support award in 1995, which the Supreme Court denied. The Appellate Division affirmed, on essentially the same grounds as its prior decision. Walker v. Walker, 227 A.D.2d 469 (N.Y. App. Div. 1996).

Following a non-jury trial in September 1999 the Supreme Court entered a divorce decree for the Walkers, which included a refusal to retroactively reduce Plaintiff's pendente lite maintenance and child support obligations. [ATT NOTES: WALKER WAS DEFENDANT IN STATE ACTION, BP] Walker v Walker, 289 A.D.2d 225 (N.Y. App. Div. 2001). On appeal, the Appellate Division again refused to reduce Plaintiff's allegedly excessive pendent lite obligations. Id. at 226. The court noted that the Supreme Court had properly denied Stephen Walker's motion to suspend support payments (based on Sandra Walker's alleged interference with his visitation rights); properly imputed his income for child support purposes; and properly refused to impose a constructive trust on certain properties conveyed from Stephen to Sandra during their marriage, in light of Stephen's testimony that he "conveyed the properties as part of a fraudulent scheme to hide them from his creditors." Id. [ATT NOTES: ABSOLUTELY NO SUCH TESTIMONY ANY WHERE IN THE RECORD. TESTIMONY FROM WALKER'S COUNSEL THAT TRANSFERS WERE DONE LEGALLY UPON THE ADVICE OF COUNSEL... THIS IS AN EXAMPLE OF STATE COURT'S DISENGENIOUS ATTEMPT TO CREATE A SMOKE SCREEN TO DIVERT THE ISSUES BY CREATING EVIDENCE THAT IS NOT IN THE RECORD, BP]

Finally, the Appellate Division noted without elaboration that Stephen's "remaining contentions are without merit" Id.

[ATT NOTES: COURT FAILED TO ADDRESS THE CONSTITUTIONAL CHALLENGE BECAUSE COURT HAS VESTED INTEREST IN MAINTAINING SAME, B. P]

Plaintiff apparently appealed this ruling to the New York Court of Appeals "on constitutional grounds," but the Court dismissed his appeal without explanation. Walker v. Walker, 98 N.Y. 2d 646 (2002).

On or about September 9, 2003, Plaintiff filed the present federal lawsuit claiming that his pendente lite award was unsupported by "one scintilla of evidence" and "grossly excessive by more than 400 percent." Complaint at ¶ 45-r, Plaintiff also claims that he had "accumulated arrears of pendente lite support in the amount of more than $ 167.000.00" at the time of trial, id., and that the application of the pendente lite scheme has caused him permanent prejudice by depriving him of numerous liberty, property, and familial rights. Complaint at ¶ 61, 70. On March 4. 2004, the State moved to dismiss his complaint. In his opposition memorandum of March 31, 2004, Plaintiff offered to amend his complaint to include other similarly situated individuals, and to seek certification for a class action.

DISCUSSION

I. Legal Standard for Dismissal

The State's Motion to Dismiss is brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim upon which relief can be granted. See State's Notice of Motion. But Plaintiff suggests that because the State's memorandum deals with jurisdictional issues, the State's motion should more properly be considered a motion to dismiss pursuant to Rule 12(b)(1), for lack of subject matter jurisdiction. Pltf. Memo at 1. The issue is academic, since motions to dismiss for subject matter jurisdiction under Rule 12(b)(1) are reviewed under the same standards as

motions to dismiss for failure to state a claim under Rule 12(b)(6). See Gambino v. Rubenfeld. 179 F.Supp 2d 62 6 (E.D.N.Y. 2002) (citing Moore v. Paine Webber, Inc., 189 F.3d 165, 169 n 3 (2d Cir. 1999); and Jaghory v. New York State Dep't of Educ., 131 F .3d 326, 329 (2d Cir 1997) Specifically, the court must "review the allegations in the light most favorable to the Plaintiffs, and draw all reasonable inferences in their favor." Id. If, despite this review, a plaintiff fails to demonstrate a basis for federal jurisdiction, or if it appears beyond doubt that he can prove no set of facts in support of his claim that entitle him to relief, the case must be dismissed. Integrated Tech. & Dev., Inc. v. Rosenfield. 103 F.Supp.2d 574. 577-78 (E.D.NY 2000) (citing King v. Simpson, 189 F.3d 284, 286 (2d Cir.1999); Bernheim v. Litt, 79 F.3d 318, 321 (2d Cir.1996); Moore, 189 F.3d at 169 n. 3; and Jaghory, 131 F.3d at 329).

II. The Rooker-Feldman Doctrine bars consideration of Plaintiff's claim.

The State argues that the "Rooker-Feldman Doctrine" deprives this Court of subject-matter jurisdiction over the present case. [2] Plaintiff argues that the doctrine does not apply to his claim, because he is not requesting the review, reversal, or modification of a state court's judgment Pltf: Memo at 4-5. Alternatively, Plaintiff argues that his case fits within an exception to the doctrine. Id. at 6-7. Both of Plaintiff's arguments are erroneous.

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[22] The State offers two other grounds for dismissal: Plaintiff's lack of standing and collateral estoppel. Deft. Memo at 5-9. Because "the Rooker-Feldman doctrine affects the threshold issue of the district court's subject maner jurisdiction," Mitchell v. Fishbein, 377 F.3d 157. 165 (2d Cir. 2004), it is considered first. Because this issue is also dispositive, there is no need to reach the State's other arguments.

A. Plaintiff is requesting a direct reversal of the state courts' judgment not a general challenge to tile constitutionality of the law.

"'The Rooker-Feldman doctrine provides that, because only the United States Supreme Court may review a final decision of a stale court, federal district courts do not have jurisdiction over claims that have already been decided, or that are 'inextricably intertwined with issues that have already been decided, by a state court. Bridgewater Operating Corp. v. Feldstein, 346 F.3d 27, 29 (2d Cir. 2003). However, the Supreme Court also stated in District of Columbia Court of Appeals v. Feldman, the case fully defining the doctrine, that although "a United States District Court has no authority to review final judgments of a state court in judicial proceedings," a district court does have authority to consider a "general challenge to the constitutionality" of a state law, even if mounted by the parties defeated in a State judicial proceeding decided pursuant to that law. 460 U.S. 462, 482~83 (1983). Plaintiff insists that he is "not challenging any specific state count judgment:' but rather, is "challenging the statutory scheme, i.e., the procedures leading up to the judgment and making a 'general challenge' to the subject statutes in question." Pltf. Memo at 5. This says Plaintiff, is permitted under Rooker~Feldman. Id. While a cursory perusal of Feldman' s language suggests potential merit in Plaintiff's argument, a closer look indicates that Plaintiff has misread the applicable law, or distorted the nature of his state claim.

The Supreme Court stressed in a note in Feldman that a federal district court may not, even "in essence," review a state court decision. 460 U.S. at 482, n.16. Justice Brennan, the author of Feldman, later explained that the inferior federal counts do not impermisslbly review state decisions if the constitutional claims presented to the federal court are" 'separable from and collateral to' the merits of the state-court judgment." Pennzoil Co. v. Texaco, Inc. 481 U.S. 1,21

(1987) (Brennan, J., concurring). And the Second Circuit has agreed that "a federal claim is inextricably intertwined with the slate-court judgment if the federal claim succeeds only to the extent that the State court wrongly decided the issues before it." Hachamovitch v. DeBuono, 159 F.3d 687, 694-95 (2d Cir. J998) (quoting Pennzoil, 481 U.S. at 25 (Marshall, J., concurring)). Thus, according to the Tenth Circuit, even where a plaintiff mounts what is termed as a general challenge to a state procedure, if he only seeks to "undo" a prior state judgment, then his claim is barred by Rooker-Feldman. Kenmen Engineering Y. City of Union, 314 F.3d 468, 477 (10th Cir. 2002).

Plaintiff, by his own admission, extensively litigated the constitutional questions surrounding the pendente lite scheme at every level in the state court system before to filing the present claim. [3] The New York courts could thus not have affirmed the judgment against Plaintiff without implicitly affirming the constitutionality of the state trial court's pendent lite order.[4] By definition, then this issue

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[3] While it is not clear that Plaintiff made the exact same arguments at the various stale levels, a state plaintiff cannot "reserve" some of his federal claims to later defeat collateral estoppel or Rooker-Feldman in a federal court See Hickerson v. City of New York, 146 F.3d 99, 110-\2 (2d Cir. 1998).

[4] Plaintiff complains that "no court therein has addressed with any specificity whatsoever the merit of the rational argument put forth and mountain of legal authority supporting said constitutional challenge." Complaint at' 11. But the brevity of state court's opinion will not prevent application of Rooker Feldman. ITT Corp. v. Intelnet Int'l Corp., 366 F.3d 205, 212-13 (3d Cir. 2004). "[I] f a state court considers and rejects a constitutional claim on the merits, a paucity of explicit analysis in the court's opinion will not strip the holding of its validity for purposes of Rooker-Feldman's jurisdictional bar." Gulla v. N. Strabane

was decided by the state court and relief in the present case can only be predicated on undoing an error in the state courts. [5]

[ATT NOTES: STATE COURTS NEVER ADDRESSED THE CONSTITUTIONAL ISSUE WHATSOEVER. THIS DOES NOT EQUATE TO BRIEVITY OF A POSITION. IT IS OMMISSION. B.P]

In determining whether a plaintiff seeks to challenge a state law generally, or seeks to "undo" a state adjudication, it is also helpful to consider whether the relief he seeks is retrospective or prospective. The Third Circuit has explicitly explained that Rooker- Feldman does not apply where a federal claimant seeks only prospective relief from an allegedly unconstitutional state procedure, and "does not request the district court to interfere in any way" with a prior state decision or with the enforcement of that decision. "[S]uch relief if granted, could affect future decisions of the state supreme court, [but] it would not require review of past decision." Centifanti v. Nix, 865 F.2d 1422, 1430 (3d Cir. 1989).

In Feldman itself, the plaintiffs sought to take the District of Columbia bar examination, but were barred from doing so under a rule promulgated by the D.C. Court of

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Township, 146 F.3d 168, 172 (3d Cir. 1998). The Third Circuit has noted that in Feldman itself, the state court's per curiam order adjudicated the plaintiff's constitutional claims summarily, even referring to each of the claims. But because the decision was "overarching," and "implicitly den[ied] all onus legal claims," it was sufficient to invoke the doctrine. Id.

[5] Compare Hachamovitch, 159 F.3d at 695 (finding no Rooker-Feldman bar to constitutional claim that succeeds only if state court's legal interpretation was correct).

Appeals allowing only graduates of accredited law schools to sit for the examination. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 463-66, 470, 71 (1983). The plaintiff's brought suit against the court in federal district court, seeking both a declaration that the defendants' actions were unconstitutional, and injunctive relief permitting them to sit for an upcoming bar examination Id. at 468-69, 472-73. The Supreme Court concluded that a federal court could properly consider the plaintiffs' general challenge to the constitutionality of the local bar rules, .as they "do not necessarily require a United States District Court to review a final state court judgment in a judicial proceeding," Id. at 485·86. Thus, Feldman allowed a general challenge to the constitutionality of the District of Columbia's bar examination procedures - but it did so in order to allow the plaintiffs to take the bar examination in the future, not to reverse any past decision denying their admission to the bar exam. Feldman, 460 U.S. at 469, 473, 487.

The Tenth Circuit applied similar logic in finding that Rooker-Fcldman barred a plaintiffs federal claims in Kenmen Engineering v. City of Union, 314 F,3d 468 (IOlh Cir.2002): it focused on the fact that "the injury' for which plaintiffs seek redress is not the possibility of Union City applying its municipal fire code against them in the future. Rather, Plaintiffs seek damages for Union City's past application of its municipal fire code -- an application sanctioned in a prior state-court judgment." Id. at 477 (emphases added).

In this case, the relief sought by Plaintiff is essentially retrospective relief from a past judgment ordered against him by the state courts. Prospective lawyers can sit for a subsequent bar examination; a business can face future zoning compliance proceedings; but there is no suggestion when, if ever, Plaintiff will remarry, then divorce, and then suffer another pendente lite judgment. Rather, Plaintiff

complains of ongoing burdens resulting from the past judgment against him, see Complaint generally, and at ¶ ¶109-10, and argues that he intends to return to state court with a "general declaration of unconstitutionality " obtained here, and "seek modification of the judgment against him." Plaintiff cites no authority suggesting that this is permitted under Rooker-Feldman, and would not amount to an attempt to retrospectively undo the state adjudication of his claims.

B. Plaintiff's claims are also "inextricably intertwined with his state proceedings under the 2nd Circuit's preclusion analysis.

The 2nd Circuit has stated that Feldman's "inextricably intertwined clause (at 460 U.S. at 482 n.16), "means, at a minimum, that where a federal plaintiff had an opportunity to litigate a claim in a state proceeding . , ., subsequent litigation will be barred under the Rooker-Feldman doctrine if it would be barred under principles of preclusion." Moccio v. New York State Office of Court Admin., 95 F.3d 195, 199-200 (2d Cir. 1996), If a suit or claim would be barred in state court by either claim preclusion [6] or issue preclusion. Rooker-Feldman prevents the federal court from asserting subject matter jurisdiction. Vargas v. City of New York, 377 F.3d 200, 205 (2d. Cir. 2004). In this case, application of issue preclusion (or collateral estoppel) factors indicates that Plaintiff's claims would be precluded from relitigation in New York's courts. For this reason as well, the Rooker-Feldman Doctrine applies to bars Plaintiffs present claims.

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[6] The State has not raised or argued the issue of whether claim preclusion (or res judicata) applies 10 this case, and the issue therefore need not be considered. See Scherer I'. Equitable Life Assurance Society of us., 347 F.3d 394, 398 & n.4 (2d. Cir. 2003).

Under New York law, issue preclusion occurs if (l) the "issue in question was actually and necessarily decided in a prior proceeding," and (2) "the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." Colon v. Coughlin, 58 F.3d 865, 869 (2d. Cir. 1995) (citing, inter alia, Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 455 (1985)). The party seeking the benefit of collateraJ estoppel. has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action. Colon, 58 F.3d at 869 (citing Kaufman, 492 N.Y.S,2d at 588-89).

1. The state courts actually and necessarily decided the issue in question.

As mentioned, Plaintiff's own complaint acknowledges that the constitutional issues in this action were "duly brought" before the state courts. Complaint at ¶11. However, he argues that there is no identity of issues between his state and federal cases, because "in the state proceeding, plaintiff was arguing a 'specific grievance' and sought 'specific relief' from the state court," whereas "[t]his action is a 'general' not 'specific' challenge to the subject statutory scheme." Pltf. Memo at 11·12. As discussed above, Plaintiff's general constitutional claims were brought before the state court. Moreover, even assuming that Plaintiff is seeking a different remedy in the present case, "requested remedies need not remain the same in order for issue preclusive effect to be given [to] a prior determination." Plough v. W. Des Moines Cmty. Sch. Dist., 70 F3d d 512, 516 (8th Cir. 1995) (citing U.S. v. .Utah Constr. & Mining Co., 384 U.S. 394, 418 (1966)). Plaintiff cites no authority to the contrary.

2. Plaintiff had a full and fair opportunity to litigate the issue.

Plaintiff argues that he was denied a full and fair opportunity to litigate his constitutional issues in state court.[7] Determination of a full and fair opportunity to litigate an issue involves consideration of "the nature of the forum and the importance of the claim in the prior litigation….. the incentive to litigate, the competence of counsel. the availability of new evidence and any differences in the applicable law and the foreseeability of future litigation" Banks v. Person, 49 F.Supp.2d 119, 128 (E.D.N.Y. 1999) (citing Ryan v. New York Tel. Co., 62 N.Y.2d 494, 500 (1984)). Based on these factors, Plaintiff does not meet his burden of proving that he lacked a full and fair opportunity to litigate.

a. The Nature of the Prior Forum:

Plaintiff argues that he lacked a full and fair opportunity to litigate in state court because the nature of that forum "is 'suspect' and not an impartial and disinterested tribunal as required for the proper protections afforded

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[7] This argument actually comes in response to the State's separate, but related argument for dismissal on collateral estoppel grounds, and not in the context of a Rooker-Feldman analysis. Deft. Memo at 7-9; Pltf: Memo at 10-17. As noted previously at note I, infra, this decision does no! reach the State's collateral estoppel argument. However, because the doctrines of Rooker-Feldman and collateral estoppel are so closely related, Plaintiffs argument can properly be applied and considered here, under the Rooker-Feldman rubric instead. See generally 18B CHARLES ALAN WRIGHT. ARTHUR R MILLER, & EOWAROH. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4469.1 (2d ed 2002).

litigants under the 14th Amendment's due process clause." Pltf. Memo at 16. This argument falls short.

It is true, as Plaintiff insists, that "[a] fair trial in a fair tribunal is a basic requirement of due process," and that "[f]airness of course requires an absence of actual bias in the trial of cases." In re Murchison, 349 U.S. 133, 136 (1955). Pltf. Memo at 16. And the Supreme Court has noted that "even when issues have been raised, argued, and decided in a prior proceeding, and are therefore preclusive under state law," their redetermination may be warranted" 'if there is reason to doubt the quality, extensiveness, or fairness of the procedures followed in prior litigation' " . Haring v. Prosise, 462 U S. 306. 317-18 (1983) (quoting Montana v. U.S., 440 U.S. 147, 164 n.11) (1979)). But a plaintiff cannot meet his burden or showing the lack of a full and fair opportunity to litigate a prior action through a "bare conclusory allegation." Samhammer v. Home Mut. IllS. Co. of Binghamton, 507 KY.S.2d 499, 502 (N.Y. App. Div. 1986). Rather the plaintiff must "point[] to specific instances from which it can be concluded that the proceeding ... or its decision, was fundamentally unfair." Id.

Plaintiff does not allege any specific incidents indicating. that his State court proceedings were unfair. Instead. he alleges simply that the State courts are "clearly unwilling to protect the fundamental rights of due process and equal protection of citizens who are subjected to the unconstitutional statutory scheme because the state has a vested interest in maintaining said scheme." Pltf. Memo at 17. This sort of "bare conclusory allegation" is clearly insufficient to meet Plaintiff's burden of proving that he was denied a full and fair litigation opportunity in state court. [8]

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8. [8] Plaintiff more fully expounds upon his claims of stale court bias in a separate section of his opposition memorandum (discussed infra, at 17), in which he argues for an exception to the Rooker-Feldman doctrine. But at no point does he

b. The Foreseeability of Future Litigation

Plaintiff also argues that he lacked a full and fair litigation opportunity in state court based on the "considerable forseeability of future litigation." Pltf. Memo at 16. According to Plaintiff, "if this miscarriage of justice does not come to constitutionally correct closure, the 'foreseeability of future litigation' is well beyond substantial. It is absolutely guaranteed." Id. Plaintiff fundamentally misunderstands the significance of this issue in the collateral estoppel context.

The "foreseeability of future litigation" is not, as Plaintiff insinuates, a club to be used by a claimant to threaten future litigation if his present case, and a dispositive collateral estoppel inquiry, are resolved in the defendant's favor. Rather, the foreseeability future litigation refers to whether the defendant in a past case should have expected to additional lawsuits over an issue litigated in that case. Greater foreseeability of subsequent claims regarding that issue implies greater efforts on the defendant's part to fully litigate the issue in the first instance. See generally 18 CHARLES ALA .... WRIGHT, ARTHL'R R. \HLLER. &: EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4424 (2d ed. 2002). Thus, a high foreseeability of future litigation generally weighs in favor of collateral estoppel, not against it. This issue is closely related to the "incentive to litigate" element of the "full and fair opportunity to litigate" inquiry, [9] and Plaintiff, by his plain

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point to any specific instance where a Stale court prevented him from fully and fairly litigating his claims. Pltf. Memo, at &.10.

[9] Wright, Miller, and Cooper have stated:

admission, "had the incentive to litigate" his constitutional claims in state court. Pltf: Memo at 16. The foreseeability of future litigation thus weighs in favor of precluding Plaintiff's claims, and applying the Rooker- Feldman doctrine.

C. Plaintiff's claimed exception to Rooker-Feldman does not control. Plaintiff argues that even if his claims are generally of the sort barred under Rooker-Feldman, his case fits within an exception to the doctrine allegedly articulated by the Seventh Circuit in Nesses v. Shepard, 68 F.3d 1003, 1005 (7th Cir. 1995). Nesses suggests that where a plaintiff claims that a state court's decision "violated some independent right of his, such as the right (if it is a right) to be judged by a tribunal that is uncontaminated by politics," he can bring suit in federal court without being barred Rooker-Feldman. Id at 1005. Plaintiff alleges, in purely conclusory fashion, [10] that "the state court was biased and/or corrupted by a vested, interest in the outcome of this case. Pltf. Memo at 7. Accordingly. Plaintiff claims, Rooker-Feldman is inapplicable to this case. Id.

The most general independent concern reflected in the limitation of issue preclusion by the full and fair opportunity requirement goes to the incentive to litigate vigorously in the first action. The stakes in the first action may be so small that extensive effort is not reasonable if the risk is limited to the first action. Few non institutional litigants would spend $50,000 to defend a 55,000 claim, unless there is reason to foresee that the same issues may arise in future litigation for more substantial stakes. Denial of preclusion on this score may thus be tied closely to concern with the foreseeability of later litigation involving the same issue.
18 CHARLES ALAN WRIGHT, ARTHUR R MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE A~D PROCEDURE § 4423 (2d ed. 2002).

[10] See discussion supra, at 15 and note 8.

[ATT NOTES: WALKER DOES GIVE SPECIFIC EXAMPLES OF STATE COURT'S BIAS INCLUDING STATE TRIAL COURTS FABRICATION OF EVIDENCE AND ITS OPEN INTIMIDATION AND ATTEMPT TO CORECE SETTLEMENT USING UNJUSTIFIED ARRERAGE AS LEVERAGE TO SETTLECASE. BP]

Nesses was decided on the basis of res judicata, not Rooker-Feldman. Nesses, 68 F .3d at 1004. The language cited by Plaintiff is thus dicta, and need not govern this decision. Moreover, the Second Circuit has never adopted Nesses or its reasoning, and Nesses thus need not be applied in the present case to prevent application of Rooker-Feldman.

D. Rooker·Feldman: summary

Under the Rooker·Feldman doctrine, Plaintiff's claims simply not within this Court's subject matter jurisdiction. These claims fundamentally seek to undo and are inextricably intertwined with, the essence of a state court adjudication. Plaintiff's only recourse is therefore to the United States Supreme Court, not a United States District Court. III. Dismissal of Plaintiff's Claims Moots His Request for Class Certification Plaintiff's memorandum opposing to the State's dismissal motion includes an informal request to amend his complaint to include additional plaintiffs and obtain class certification. Pltf. Memo @ 14-15. Plaintiff has \also submitted affidavits from other New York residents allegedly harmed by the State's pendente lite system in the course of divorce proceedings. The State's reply memorandum opposes this request as untimely, and notes that it is unnecessary, since a judgment finding in favor of Plaintiff's constitutional claims would necessarily apply to anyone affected by the nullified statute, thus negating the need for a certified class." Deft. R Memo at 4-5.

Because Plaintiffs claims are barred on jurisdictional grounds and dismissed herein, his request for class certification is rendered moot. See Stewart v. Baltimore Teachers Union, 243 F.Supp.2d 377, 378 n.1 (D.Md. 2003); Gaffnev v. U.S., 834 F.Supp. 1, 5 (D.D.C. 1993); and Christos v. U.S., 48 Fed.Cl. 469, 479 & n.24 (2000).

CONCLUSION

For the reasons discussed above, Defendants' motion to dismiss is GRANTED. The Clerk of Court is accordingly ordered to close this case.

SO ORDERED.

Dated: Central Islip, New York November 22, 2004

Denis R. Hurley

United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF NEW YORK

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STEPHEN J. WALKER,

Plaintiff,

JUDGMENT

against CV-03-4490

STATE OF NEW YORK, NEW YORK STATE OFFICE OF TEMPORARY and DISABILITY ASSISTANCE, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, SANDRA C. WALKER,

Defendants,

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A Memorandum Opinion and Order of Honorable Denis R. Hurley, United States District Judge, having been filed on November 22, 2004, granting defendants' motion to dismiss plaintiffs complaint, it is ORDERED AND ADJUDGED that plaintiff take nothing of defendants; and defendants' motion to dismiss is granted; and that plaintiffs complaint is hereby dismissed.

Dated: Central Islip, New York

November 29, 2004 ROBERT C. HEINEMANN
CLERK OF THE COURT

By: Lorraine Sapienza Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS COURT FOR THE SECOND CIRCUIT OF NEW YORK

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STEPHEN J. WALKER,

Plaintiff

AFFIRMATION IN SUPPORT OF PLAINTIFF'S APPEAL

03-CV-4490

STATE OF NEW YORK, NEW YORK STATE OFFICE OF TEMPORARY and DISABILITY ASSISTANCE, NEW YORK STATE DEPARTMENT OF TAXATION and FINANCE, SA'NDRA C. WALKER,

Defendants

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Burke Probitsky, an attorney admitted to practice in the Courts of the State of New York, hereby affirms under the penalties of perjury as follows:

1. Honorable Judges of the United States Second Circuit Court of Appeals, I am the attorney of record for Plaintiff in the matter of Walker v. State of New York, et al. I have been an officer of the Court and member of the bar in good standing actively practicing law for the past 35 years. I have and continue to appear on Plaintiffs behalf, pro bono inasmuch as Plaintiffs right to earn a living has been

egregiously abridged and prejudiced by the State of New York. This matter is more fully addressed hereinbelow.

2. As of the date of this affirmation, this case is before the Federal District Court for the Eastern District of New York. I am awaiting a decision on defendant's motion to dismiss. In the event that the District Court, dismisses this action and, with the realistic expectation that due to my illness I will not be able to complete the prosecution of this case should appeal be necessary. ! have taken the liberty to make this final affirmation for the purposes of appeal. This affimlation is prepared with the anticipation of how the District Court may decide to dismiss this action. Accordingly, if this affirmation is now before the Honorable United States Second Circuit Court of Appeals then, indeed, I have scum to illness and based upon my doctor's prognosis I am deceased. In the interests of justice I pray that this Court consider my final affirmation during its deliberations on this appeal.

3. In brief summary: Plaintiff seeks both a declaration of unconstitutionality and an injunction for prospective relief. Plaintiff is not requesting that the District Court review, modify, or vacate any state court judgment This federal action involves a "general" constitutional challenge to the New York State statutory scheme that authorizes the issuance, modification and enforcement of pendente lite [temporary] awards of spousal maintenance and/or child support. Consistent with the subject statutory scheme temporary awards are granted upon conflicting affidavits, without establishment of need, without a hearing of any kind whatsoever nor any findings of fact, [financial or otherwise], having been determined. However, the award which the payor is order to pay is not "temporary". It is, in fact, permanent as to the minimum amount the payor must pay. Such awards may never be modified retroactively downward, only upward at the time of trial when findings of

fact mayor may not confirm the accuracy of the temporary award. The permanent accumulating prejudice, i.e., arrears emanating from an excessive temporary award may never be retroactively erased or modified, even when finings of fact adduced at trial reveal the award was excessive.

4. Moreover, during the hiatus period between the issuance of a temporary award and the trial of an action, temporary awards, as excessive as they may be, are subject to the full weight of the state's enforcement protocol as if indeed, the award was a permanent award that had been subjected to a due process hearing and the scrutiny of a fact finding. Payor litigants who are unable to comply with excessive temporary awards have their property confiscated, are held in contempt and incarcerated. Temporary orders emanating from the subject statutory scheme amount to "summary judgment" even though at the time of the order is issued, triable issues of material fact exist and are in controversy. During my 35 years of practicing law, I know of no other area in law where such a flagrantly unconstitutional protocol exists. In New York State capricious and improvident discretion is a substitute for due process of law.

ROOKER-FELDMAN ALLOWS A GENERAL CONSTITUTIONAL CHALLENGE AND "PROSPECTIVE" RELIEF:

5. Plaintiff comes before this Appeals Court undoubtedly arguing that the District Court erred in failing to exercise its jurisdiction. Assuming the District Court dismissed this action citing the Rooker-Feldman doctrine, respectfully submit that Rooker-Feldman does llill bar the District Court from accepting jurisdiction, to wit: The Supreme Court in: District of Columbia Court of Appeals v. Feldman, 460 U.S. 462,103 S. Ct. 1303, 74 L.Ed 2d 206 (1983) concluded that a federal court ruled properly consider a "general " challenge" to the constitutionality of local bar

rules, as same "do not necessarily require a United States District Court to review a final state court judgment in a judicial proceeding" In Feldman, the plaintiffs sought both a declaration that the defendant's actions were unconstitutional and injunctive relief permitting them to sit for an upcoming bar examination. The Supreme Court concluded that plaintiffs could challenge the constitutionality of the scheme for prospective relief. i.e. to take the bar examination in the future. The decision in Feldman was designed not to reverse any past decision denying plaintiffs admission to the bar exam. Plaintiffs who were previously not allowed to take the exam in the past and had failed in their [state] challenge, were entitled to a general constitutional challenge to allow them to take the exam in the future. The past decision of the District of Columbia Court of Appeals was "technically" not affected by the Supreme Court's decision in Feldman, however it could affect future decisions of the District of Columbia Court of Appeals.

6. The Third Circuit in the matter of Centifanti v. Nix, 865 F. 2d 1422, 1430 (3d Cir. 1989), addressed this issue concluding that Rooker-Feldman does not apply where a federal claimant, as here, seeks prospective relief !Tom an allegedly unconstitutional state protocol and "does not request the district court to interfere in any way", with a prior state decision or with the enforcement of that decision. The Third Circuit concluded that **"such relief, if granted could affect future decisions of the state supreme court (but) it would not require the review of a past decision."**

7. The foregoing application of the Supreme Court's reasoning in Feldman is applicable and appropriate to the case at bar. The Third Circuit's holding in Centifanti v Nix, supra, is consistent with the case at bar. Plaintiff is not asking the District Court to interfere in any way with the prior state decision nor the enforcement of that decision. Plaintiff has clearly stated that this action is not requesting

that the District Court review, modify or vacate a state court judgment. Facts presented within the complaint are presented for background and atmospheric purposes. Plaintiff makes a "general challenge" seeking a declaration that the subject statutory scheme is unconstitutional and moreover, Plaintiff seeks injunctive relief for prospective damages in the future. Just as the "would be" attorneys in Feldman wanted the right [opportunity) to sit for the bar examination in the future absent the unconstitutional prejudice caused by the relevant rules they sought to challenge, Plaintiff wants and has the right to marry and divorce in be future absent the unconstitutional prejudice which will be caused by the relevant statutory scheme. In Loving v. Virginia, 338 U.S. 1 (1967), the Supreme Court recognized that the "right to marry" is a fundamental right protected by the Constitution. I respectfully submit that the ability to sit for an "exam" in the future as in Feldman, unencumbered by prejudice derived from unconstitutional policies and procedures is pale In comparison to the "right" to marry and divorce in the future unencumbered by prejudice derived from unconstitutional policies and procedures of the subject statutory scheme. Plaintiff is not asking the federal court for specific relief from the permanent prejudice, i.e. money judgments, which the subject statutory scheme has inflicted upon him. However, Plaintiff has faced the nightmare of what the state's unconstitutional protocol can and did produce once, .. and once is enough. The subject statutory scheme prospectively infringes upon Plaintiffs fundamental rights. Accordingly, Plaintiff herein should not be barred by Rocker-Feldman and because Plaintiff herein seeks prospective relief.

EXCEPTIONS TO ROOKER-FELDMAN, PRECLUSION and COLLATERAL ESTOPPLE APPLY TO THIS CASE:

8. For reasons as set forth hereinbelow, the question of whether, or not, this federal constitutional challenge is inextricably intertwined with a state court judgment must be

answered in the negative. Nor is this action barred by the principles of preclusion or collateral estopple, to wit:

This Court has held that the 'inextricably intertwined" clause in Feldman, "'means at a minimum, that where a federal plaintiff had an opportunity lo litigate a claim in a state proceeding , subsequent litigation will be barred under Rooker-Feldman doctrine if it would be barred under the principles of preclusion." Moccio v. New York State Office of Court Administration, 95 F.3d 195, 199-200 (2d Cir, 1996).

9. Within Points 11 and III of Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss is an extremely important aspect of consideration for the establishment of federal jurisdiction, i.e., the presence of a "corrupt" process. This issue cuts to the heart of whether this federal constitutional challenge is inextricably intertwined with a state court judgment and/or if, the principles of preclusion apply to this case. A corrupt process in the judicial sense is bias and the lack of impartiality by a tribunal. Point 11 of Plaintiffs Memorandum in Opposition cites the dicta found in Nesses v Shepard, 68 F.3d 1003, 1005 (7th Cir. 1995). Said dicta is sound judicial reasoning and wisdom. Litigants are entitled to an "impartial" tribunal, one that is not contaminated by politics nor a vested interest in the outcome of the proceeding. If such a contaminated forum exists then Rooker-Feldman should not [and would not] act as a bar to federal jurisdiction. The Second Circuit has not officially adopted the reasoning in Nesses. It is respectfully submitted that this Court should recognize and acknowledge the 'wisdom of the Seventh Circuit mandating a requirement of fair play through impartiality as found in Chief Judge Posner's stated majority opinion. As detailed within Plaintiff's Memorandum in Opposition the dicta of the Seventh Circuit is clearly supported by the United States Supreme Court in lie. Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942, (1955) which staled that, "Duc

process entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." The mandate that our judicial process be free from bias, impropriety and a vested interest in the outcome of litigation is very necessary to insure the proper functioning of our judiciary. It insures that citizens have an impartial tribunal. Absent an impartial tribunal our system of laws is as unholy as the doctrine of anarchy.

PRIMA FACIE EVIDENCE OF CONTAMINATION:

10. As an Officer of the Court I affirm from my death bed that the permanent prejudice derived from temporary awards granted without due process of law is used as "leverage" by the courts of the state to force settlement of cases not upon merit. but solely upon the unjustified, unconstitutional permanent prejudice. I affirm from my personal experience and first hand observations that the New York State Court is **not** an impartial tribunal when it comes to determining whether, or not, the subject statutory scheme provides due process and equal protection because the state court has a vested interest in the outcome of such a constitutional inquiry. The vested interest is case load reduction based upon the utilization of said leverage. I affirm that is exactly what took place in this action at the state level. As soon as the state court realized that Plaintiff had permanent prejudice derived from the subject statutory scheme, the court went "off the record" and attempted to intimidate and coerce Plaintiff into settling this case on the eve of the trial based solely upon the accumulated permanent prejudice from which Plaintiff had no hope of recovery. I witnessed said coercion and a disgruntled court when Plaintiffs answer was that he would seek to have the statutory scheme declared unconstitutional. My affirmation constitutes prima facie evidence that corruption exists within the state judiciary.

11. Moreover, in fact, I affirm from my death bed that the state's conduct in Plaintiffs case is not isolated. It is very common. It takes place on a day to day basis around the state. I have seen it more times than 1 can count in cases I have been involved in. Sometimes my client is the payor and he or she bends with the pressure and coercion and settles the case. Those who do not settle and go to trial end up with substantial unjustified judgments representing arrears from an excessive pendente lite award. Sometimes, my client is the payee. In such cases where the other side has been ordered to pay an excessive temporary award and is seeking to settle the case, 1 grit my teeth as 1 realize that my client's "victory" has nothing to do with the merit of the case. It based solely upon unjust enrichment derived from a statutory scheme that is void of due process and is designed to produce leverage. 1 further affirm that coercion by the state been taking place since on or about 1983, the year that the New York's Appellate Division, Second Department, rendered the subject statutory scheme unconstitutional based upon its judicial interpretation thereof.

12. Contained with Plaintiffs Memorandum of Law in Opposition is an informal request for certification of the class of "Familial Obligors," a class recognized by the United States Supreme Court of which Plaintiff is a member. Subsequent to the submission of my said Memorandum of Law, I forwarded to the court seven affidavits from seven state residents each of whom has been involved in a divorce proceeding and each of whom has been permanently prejudiced by the subject statutory scheme. All swear that accumulated permanent prejudice emanating from excessive pendente Ute awards was the basis for coercion and the court's illegitimate attempts to force settlement of their respective cases. In addition, I submitted an affirmation from another attorney, an officer of the court and member of the bar in good standing who practices matrimonial law in New York State. Said attorney's first hand observations and conclusion as stated in his saw affirmation are consistent

with my own. The state is complicate in a scheme to reduce its caseload in domestic relations cases by utilizing the leverage created by the subject statutory scheme. I note that one of the seven affidavits submitted is submitted by a practicing attorney who himself became a victim of the statutory scheme and experienced and witnessed first hand the state's attempts at coercion.

13. In total, the Court has before it the sworn word in affirmation of two practicing attorneys. [myself included] who attest that the state court is using the subject statutory scheme and the permanent prejudice derived therefrom as leverage to coerce the settlement of cases and the sworn statements of seven state residents, [one of whom is an attorney] who were subjected to the statutory scheme and swear that in respective their cases the court attempted to coerce them into settling based upon the leverage derived from the subject statutory scheme.

14. All voices resonate as individuals and in unison with the Plaintiff herein. The permanent prejudice emanating from excessive temporary awards is used as leverage by the state court to coerce litigants into settling cases not upon merit but solely upon the permanent prejudice from which there is no hope of recovery. I note that two of the said citizens submitting affidavits were incarcerated for their inability to comply with excessive temporary awards, temporary awards which never were subjected to any form of examination to determine fact from fiction.

15. The District Court has before it unchallenged prima facie evidence of a "corrupt process". Such unchallenged prima facie evidence would lead any reasonably minded individual to conclude that the state court is not an impartial tribunal for constitutional challenge because it has a vested interest in maintaining the unconstitutional statutory scheme. At no time has the State ever denied the allegation[s] that the State's tribunal lacks

impartiality nor has the State challenged the prima facie evidence put forth.

16. Furthermore, I affirm that I personally spoke with the Office of State Attorney General in Manhattan during the state proceedings. Said office told me in no uncertain terms that despite having the statutory mandate of Executive Law §71 to defend state laws from constitutional challenges that, that office. "after careful consideration", would not oppose said challenge. I was told by said office that after reading the brief submitted that said office agreed that the statutory scheme and its judicial interpretation and application was unconstitutional and said office could not create a viable legitimate argument to defend the statutes and the State's application of same. There was no opposition to the constitutional challenge from any front.

17. The wisdom in dicta found in Nesses establishing an exception to Rooker-Feldman where, as here, corruption [i.e., a lack of impartiality by a tribunal with a vested interest in the outcome of a proceeding], is consistent wit the opinion of the United States Supreme Court as found in Haring v. Prosise, 462, V,S, 306, 76 L. Ed, 2d 595, 1093 S, Ct. 2368, wherein the honorable Justice Thurgood Marshall states thus:
"Even when issues have been raised, argued, and decided in a prior proceeding, and are therefore precluded under state law, redetermination of the issues may nevertheless be warranted if there is reason to doubt the quality, extensiveness, or fairness of proceedings foreclosed in prior litigation." (Haring at 598)

Continuing. the Honorable Justice Marshall states thus:
"Title 28 USC §1738 generally requires "Federal Courts to give preclusive effect to state court judgments, whenever the courts of the state from which the judgments emerged would do so." Allen v. McCurry,. 449 US at 96, 66 L. Ed. 2d 308,101 S. Ct .4ll. In federal

actions, including §1983 actions, a state court judgment , will not be given collateral estoppel effect, however where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court. Id at 101, 66 L. Ed. 2d 308, 101 S. Ct. 411.

Moreover, additional exceptions to collateral estoppel [462 US 314] may be warranted in §1983, actions in light of "understanding of §1983" that the "federal courts could step in where state courts were unable or unwilling to protect federal rights." Ibid, CF, Id., at 95 n7, 66 L Ed 2d 308, 101 S.Ct. 411; Board of Regents v Tomanio, 446, U.S. 478, 485-486, 64 LEd. 2d 440, 100 S. Ct. 1790 (1980) (42 USC §1988 142 USCS §1988] authorizing federal courts; in an action under §1983 to disregard an otherwise applicable state rule of law if the state law is inconsistent with the federal policy underlying §1983). "(Haring supra at 604)

I affirm that the state court was [and is] clearly unwilling to protect the fundamental rights of due process and equal protection of Plaintiff [as well as all those citizens who are presently or will be [in the future] similarly situated]. The state court was [and is] unwilling to protect those rights because it is NOT an impartial tribunal because it has a vested interest, [i.e. case load reduction], in maintaining the unconstitutional statutory scheme. That vested interest is established by prima facie evidence as addressed hereinabove.

18. The determination of what constitutes a "full and fair" opportunity to litigate an action is fundamental to this action. Plaintiff arguably had a "full" opportunity to litigate this matter to the extent that he utilized of the State appeals process noting that absent the State Attorney General's participation [and concession] there was never a paper submitted in opposition to said challenge. However, Plaintiff never had a "fair" opportunity to litigate this action within

the State Black's Law Dictionary, Seventh Edition defines "fair" as: Impartial; disinterested; Free of bias or prejudice. None of the aforestated terms apply to the state court in regards to the subject statutory scheme. When the trier of fact in the state proceeding attempted to intimidate and coerce Plaintiff into settling the case based upon accumulated permanent prejudice the lack of impartiality of the tribunal reared its ugly, unholy head. The trier of fact had a vested interest in utilizing and maintaining what has become the "doctrine" of accumulated prejudice [leverage]. Said doctrine states that despite findings of fact adduced at trial accumulated prejudice derived from temporary awards may not be retroactively downwardly modified. Hence, the statutory scheme is a tool, albeit unconstitutional, allowing the trier of fact to intimidate and to coerce settlement of cases, hence avoiding trial on the merits. The trier of fact had a vested interest in maintaining the statutory scheme and was not an tribunal when it came to hearing a constitutional challenge that would upset its proverbial apple cart.

19. When this matter was brought to the Appellate Division, Second Department, on appeal, Plaintiff was denied a "fair" opportunity to litigate therein. That court had rendered the original decision in 1983 which determined that temporary awards were not retroactively modifiable downward at the time of trial. That decision set the stage for the doctrine of leverage. Hence, the Appellate Division never addressed the constitutional inquiry because it had a vested interest in the outcome of the case. That vested interest was [and is] to maintain the doctrine of leverage and the status quo it had set in motion to reduce the state's caseload in domestic relations cases both at the trial and appellate level. The more cases that settle prior to trial based upon accumulated permanent prejudice, equates to fewer cases that reach appeal.

20. The State Court of Appeals refused to hear the constitutional challenge despite having the mandate to hear

constitutional challenges as a matter of right. That court turned a deaf ear and allowed the doctrine of leverage and the status qua established by its subordinate courts for the purpose of case load reduction to be maintained. Hence, there was no "fair" opportunity to litigate the constitutional question therein. A court must at least "hear" what is being said for a proceeding to have a semblance of being "fair"..

21. I affirm that Plaintiff never had a "fair" opportunity to litigate within the state process because the proverbial deck was stacked against him. That the state court is not an impartial tribunal is supported not only by my affirmation but by the prima facie evidence of seven citizens' affidavits and the affirmation of another officer of the court as well. Said prima facie evidence establishing that the state court is not an impartial tribunal and that the state court has a vested interest in maintaining the status quo of utilizing the leverage created by the subject statutory scheme to coerce settlement of cases must not be ignored [or inadvertently overlooked] by the District Court.

CONCLUSION:

22. Plaintiff seeks both a general declaration of unconstitutionality and prospective relief hence this action is not barred by Rooker-Feldman. Consistent with the wisdom of the United States Supreme Court in Re Murchison and Haring. supra, preclusion and/or collateral estopple should nor bar the District Court from accepting jurisdiction of this case. Furthermore, the wisdom found in Nesses, supra which is fundamentally consistent with the conclusion of the Supreme Court in Re Murchison and Haring, reveals that the corrupt process evident in this action witnessed by myself and attested too by others renders any perceived bar to jurisdiction found in Rooker-Feldman inappropriate. The Federal District Court has the authority to step in and right an unconstitutional wrong. Accordingly, this case should be

sent back to the District Court which has jurisdiction to hear this case for proper adjudication.

POST SCRIPT:

23. As stated hereinabove the trier of fact was not an impartial tribunal. Moreover, the trier of fact "white washed" aspects of the trial and denigrated Plaintiff in its decision in clear contradiction to facts adduced at trial. Said conduct was in obvious retribution for Plaintiff's not having settled the action based upon the accumulated "temporary" permanent prejudice and Plaintiff's decision to challenge the constitutionality of the said statutory scheme. The appeals process thereafter which included a "specific" constitutional challenge and request to vacate the judgment] simply ignored what was white washed and refused to address the constitutional challenge in any manner whatsoever.

24. I note for the record and affirm under the penalties of perjury and the reputation of my good name that Plaintiff comes before this Court with clean hi.111ds having fully paid, [as established federal and stale tax records and the recognized lire style of the parties] his temporary "statutory obligations" based upon percentages of income established by the state legislature which are fair and reasonable. Yet. because the subject pendente lite statutes are facially defective [being silent on the use of the statutory percentages for the issuance of temporary awards] . and defective as applied [based upon judicial interpretation thereof] the state leaves Plaintiff a debtor and stigmatized as a "dead beat" because the subject statutory scheme and the state's judicial interpretation thereof does not allow retroactive downward modifications for pendent lite awards that are found to have been, as here, excessive.

25. Moreover. Plaintiff who has been denied the most basic due process protections is presently a "prisoner" in New York State. He may drive only drive within the State with a "restricted" driver's license under very limited

conditions. I respectfully submit that in a post 911 world that restriction wrongfully and unnecessarily prejudices Plaintiffs ability to properly identify himself and function in case of emergency. That restriction wrongfully prejudices his right to engage in commerce. Plaintiff is denied a federal passport which further infringes his right to commerce and to travel. Plaintiff comes before this Court with his recognized liberty interest, i.e., his credit and credit rating decimated by the State with calloused indifference towards the economic and social consequences of that decimation. Plaintiffs right to borrow money and to earn a decent living have been crippled by the State with calloused indifference towards the consequences. As stated hereinabove, I have and continue to represent Plaintiff *pro bono* because Plaintiffs ability to earn a living has been seriously abridged bv the state's actions.

26. Moreover, the State utilizes the subject statutory scheme as a basis, in part. for the required reporting to federal authorities of support payments collected and support balances owed [including purported arrears]. Upon information and belief; the State is violating and/or ignoring federal statutes that require accurate accounting and reporting. The figures supplied to federal authorities are substantially inflated and inaccurate because the subject statutory scheme produces excessive awards which are not based upon financial reality. Upon information and belief, the State is engaging in irregular, inaccurate and arguably fraudulent conduct inasmuch federal funding to the states is based, in part, upon reported support amounts owed and collected and federal child support policy says that "closing a case" is one of the factors considered in reimbursement to the states. And, what better way to "close a case" than to coerce settlement based upon "temporary" permanent prejudice that has no basis in reality.

I respectfully submit this not what our Federal Congress intended when it enacted child support guidelines and laws to help and encourage state compliance. The

Federal Congress intended that states make accurate, fair determinations for the benefit of citizens and that the states maintain and transmit reports that are accurate. That is impossible if a State, as here, is allowed to grant excessive temporary orders absent any semblance of due process, nor a scintilla of financial evidence to support such orders.

27. Lastly, and what may be my final written thoughts on this or any matter in my love in life, the law, I respectfully submit that domestic relations laws relate to the core of America's civility and ultimately relate to the successful continuation of our society. Domestic relations laws are intended to [and should] resolve familial issues fairly and in gender neutral ways that provide due process and equal protection for all concerned. States must be required to use the least restrictive protocols to achieve State objectives. When domestic relations laws suspend due process and equal protection and produce and exacerbate discord, hostility and acrimony as the subject statutory scheme does in fact do, such laws must be seriously strictly scrutinized by an impartial tribunal, which the state court is not. Due process must never suspended for expediency to create permanent prejudice. Due process must not suspended for expediency in coercing the settlement of cases. Yet, that is exactly what has and continues to take place in New York State every day. Honorable Judges of the United States Second Circuit Court of Appeals, I pray it ends here and now

Dated: September 01, 2004

Burke Probitsky, Esq.

APPENDIX G

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July 07, 2004

Hon: Denis R. Hurley

U.S. District Court, Eastern District of New York 934
Federal Plaza, Central Islip, NY 11722-4447

Re: Walker v. State of New York, et. a/.
Docket No. CV-03-4490 (DRH) (ETB)

Honorable Sir:

Enclosed please find seven (7) original affidavits from United States citizens who are New York residents. Each shares the plight of Plaintiff in the above action. All have been denied due process and equal protection of the laws by the State of New York. All have been permanently prejudiced by the subject state statutory scheme. The Court was informed of said affidavits in Plaintiffs Memorandum of Law in Opposition to Defendant's Motion To Dismiss (pg I). By letter dated April 15,2004, Plaintiff requested oral argument on Defendant's Motion To Dismiss this action. No decision has been rendered regarding said request for oral argument. Plaintiff's intention was that said affidavits would be provided to the Court at the time of oral argument. However, this Court may decide that oral argument is not appropriate. Yet, said affidavits are germane to this action and this Court has the authority to review same [see

Robinson v Gov't 'of Malaysia, 269 F.3d 133,141 n.6 (2d Cir 20(1); Exch Nat'l Bank of Chicago v Touce Ross & Co., 544 F.2d 1126, 1130 (2d Cir. I976),]

Said affidavits attest to the egregious nature of the statutory scheme for pendente lite support as complained of by Plaintiff in this action. The statutory scheme is totally void of process of law. The permanent injury created by said scheme is being used as leverage to punish the obligor party without good cause and to coerce the unjust settlement of cases NOT upon merit but upon arbitrary and capricious temporary [i.e. "permanent"] injury. Furthermore, citizens are being routinely incarcerated for their inability to comply with excessive pendente ljte awards despite the fact that said awards were not subjected to the scrutiny of due process of law fact findings. To wit:

Affidavits from Mr. Finkler and Mr. Lawton represent the worst case scenario. Each was found to be in contempt of court and sentenced to six (6) months in jail for failure to comply with an excessive pendente lite award. Mr. Finkler is presently incarcerated He is being coerced into settling his divorce action, not upon merit but upon permanent prejudice including, the threat of future incarceration. Mr. Lawton has been incarcerated on three (3) separate occasions for his inability to comply with an excessive pendente lite award. He was coerced into settling his divorce action not upon merit but also upon permanent prejudice which Includes the threat of future incarceration. Said settlement included money judgments for purported arrears emanating from the pendente lite award.

The Court is advised that Plaintiff has two additional affidavits which, upon information and belief, are forthcoming from two additional plaintiffs who are presently incarcerated Said two additional affidavits will he forwarded to the Court as soon as they are available.

It is noted that at the contempt proceedings involving the enforcement of the pendent elite awards the fact that there was no due process of law hearing and fact finding prior to the issuance of the pendente lite award was not deemed relevant to a finding of willful failure to comply with an excessive award. Furthermore, while incarcerated pendente lite obligations continue accumulating arrears and upon release from jail all will find, [as did Mr. Lawton, themselves in a worse position than they were in prior to incarceration, i.e, with pendente lite arrears, unable to satisfy same and unable to comply with the excessive pendente lite award. Thus, all are subject to further incarceration as well as the suspension of driver's and/or professional licenses. None may acquire a passport to travel abroad. The subject statutory scheme gives a new and perverted meaning to debtor's prison.

Mr. Simmons and Mr. Smith were subjected to excessive pendente lile awards Both were threatened with incarceration and had money judgments entered against them without a hearing. Both were coerced into settling their divorce action not upon merit but upon the permanent prejudice created by the statutory scheme. Both settlements included pendente lite money judgments for purported arrears. Roth individuals remain in debt due to the permanent prejudice created by the statutory scheme.

Mr. Stephens, Mr. Ianno and Mr. Friedman all experienced the bitter taste of the subject statutory scheme. Each had to either borrow funds or strip retirement account" attempting to comply with the excessive pendente lite award. Each went to trial wherein findings of fact proved that the pendente lite awards were excessive. However, none was given credit for over payment. Outstanding pendente lite arrears were reduced to money judgment.

Also enclosed herein is the affirmation of Mr. Michael Varble, an attorney in good standing who practices

matrimonial law in New York State. He concurs on all accounts as to the egregious nature of the subject unconstitutional pendente lite statutory scheme. Contained within Plaintiff's Memorandum of Law (pg 14-15) is a request to amend the Complaint to include additional plaintiffs and to request certification of the class of individuals of which Plaintiff and those who have submitted affidavits are a part, i.e. "Familial Ohligors" The Supreme Court has recognized said class in the matter of Zablocki v. Redtail 434 U.S. 378 (1978) (Memorandum of Law @ pg 13). Plaintiff and those aforementioned represent a solid cross section of said class. {Said class has been accumulating victims for more than 20 years]

As stated within said Complaint, it was not Plaintiff's original intention to seek class certification. However, the State refuses to accept responsibility and the possibility, however remote, exists that this Court may dismiss this action. Accordingly, if the formality of a motion is required to request that the Complaint he amended to include additional plaintiffs and certification of the class, then please consider this letter a formal request for same.

What is taking place in this State is an unmitigated disgrace. The State Court has a vested interest in the statutory scheme and is not a disinterested tribunal. Allowing the State to continue utilizing the subject statutory scheme which is totally void of due process of law to burden and unjustly punish its citizens with permanent injury is an insult to our judicial system. The State's conduct must not be tolerated. The State's culpability and its potential liability are of great significant consequence. Significantly, the Attorney General expressly offered no opposition to Plaintiff's position during the state proceedings despite having the statutory mandate to defend state statutes from constitutional challenge. It is respectfully submitted that the Attorney General failed to offer opposition to said constitutional challenge because there is absolutely no defense for the

subject statutory scheme nor for the State's conduct as clearly evidenced herein.

Thank you for your consideration and courtesies herein. Please advise.

Very truly yours

Burke Prohitsky, Esq.

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